



# THE ARMY LAWYER

Headquarters, Department of the Army

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Department of the Army Pamphlet 27-50-206

February 1990

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## The Army Lawyer (ISSN 0364-1287)

### Editor

Captain Matthew E. Winter

*The Army Lawyer* is published monthly by The Judge Advocate General's School for the official use of Army lawyers in the performance of their legal responsibilities. The opinions expressed by the authors in the articles, however, do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

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*The Army Lawyer* articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*.

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. **Address changes: Reserve Unit Members:** Provide changes to your unit for SIDPERS-USAR entry. **IRR, IMA, or AGR:** Provide changes to personnel manager at ARPERCEN. **National Guard and Active Duty:** Provide changes to the Editor, *The Army Lawyer*, TJAGSA, Charlottesville, VA 22903-1781.

Issues may be cited as *The Army Lawyer*, [date], at [page number].

Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER:** Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS-DDL, Charlottesville, VA 22903-1781.

## Recent Developments in Contract Law—1989 in Review\*

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### Introduction

One of the challenges in preparing an article as ambitious as this one is culling out those changes and events of lesser importance from the large number of significant ones that affected government contract law in 1989. Congress enacted several new legislative provisions in the authorization and appropriations acts (as well as in a handful of other statutes) that will affect the way that government and industry acquire and provide goods and services for the Federal Government. Additionally, the year saw many new regulations that implemented previous legislative and other changes, and there were significant jurisdictional and substantive developments in the various forums in which contract disputes and protests are litigated. Moreover, the federal procurement system has yet to feel the impact and implementation of the Defense Management Review recommendations, but in an era of shrinking budgets it is certain that government contract law will continue to evolve to react to and meet the challenge. The practice of government contract law remains a dynamic one, which allows us to select and discuss the wide variety of subjects in this article.

Items discussed herein have been selected for their general interest and significance or because they impact upon the contracting process and the contract attorney. These items are not intended to be exhaustive.

### Authorization and Appropriations Acts

#### *National Defense Authorization Act for Fiscal Years 1990 and 1991*

##### *General*

The National Defense Authorization Act for Fiscal Years 1990 and 1991 (hereinafter the FY 1990/1991 DOD Authorization Act)<sup>1</sup> is 352 pages of what has become annual congressional guidance, authority, and direction for running the Department of Defense. The level of detail in this year's Act is evidenced by section 1632, which recommends that the Secretary of Defense dedicate a Pentagon hallway to military members who have performed space-related duties. Several provisions affecting acquisition law, policy, and management are discussed in the paragraphs that follow.

### Rule of Statutory Construction

Evidencing the ongoing friction between the authorization committees and the appropriations committees, the FY 1990/1991 DOD Authorization Act includes interpretation provisions stating that a subsequent act must specifically refer to certain Authorization Act provisions to change the provisions. Section 137 applies this rule of interpretation to several program termination provisions in sections 130 through 136 of the Act. Section 252 applies this rule to research contracts and grants at educational institutions. By passing these rules of construction, the armed services committees intended to make it more difficult to insert special interest provisions in the appropriations acts. However, several provisions of the Department of Defense Appropriations Act, 1990,<sup>2</sup> meet this strict standard.<sup>3</sup>

### Advanced Research Projects

Section 251 of the FY 1990/1991 DOD Authorization Act adds a permanent provision at 10 U.S.C. § 2371 that is of special interest to those agencies that do business with the Defense Advanced Research Projects Agency (DARPA). The section gives DARPA the authority to conduct cooperative programs with other federal agencies, state and local governments, universities, and private parties. The section also has several fiscal provisions designed to make the program workable.

### Competition in Contracts to Colleges and Universities

Section 252 of the FY 1990/1991 DOD Authorization Act amends 10 U.S.C. § 2361, the "Pork Barrel Research" statute, to temper some of the serious consequences of last year's absolute prohibition on noncompetitive awards to educational institutions.<sup>4</sup> Section 252 permits, when justified, noncompetitive awards to universities for six of the seven exceptions for other than full and open competition. The only exception that does not apply is 10 U.S.C. § 2304(c)(5) (sole source expressly required by statute). If the Secretary of Defense wants to award a grant or contract in a manner that is inconsistent with this change, he must notify Congress and then wait until 180 days have elapsed. Interestingly, some of the statutory exceptions in the Appropriations Act re-

\* This article was originally prepared for and presented to the 1990 Government Contract Law Symposium, which was held at The Judge Advocate General's School, U.S. Army, 8-12 January 1990.

<sup>1</sup> Pub. L. No. 101-189, 103 Stat. 1352 (1989).

<sup>2</sup> Pub. L. No. 101-165, 103 Stat. 1112 (1989).

<sup>3</sup> See, e.g., FY 1990 Research, Development, Test, and Evaluation, Defense Agencies, Appropriation.

<sup>4</sup> See National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, §220, 102 Stat. 2088 (1988) [hereinafter the FY 1989 DOD Authorization Act].

quire awards within 60 days. To compound the problem, Congress passed the Appropriations Act (on 19 November 1989) *after* it passed the Authorization Act (on 15 November 1989), but the President signed the Appropriations Act (on 21 November 1989) *before* he signed the Authorization Act (on 29 November 1989).

#### *OMA Funding for Investment Items*

Section 315 of the FY 1990/1991 DOD Authorization Act repeals section 303 of the National Defense Authorization Act for Fiscal Years 1988 and 1989 (hereinafter the FY 1988/1989 DOD Authorization Act),<sup>5</sup> which had placed a \$5,000 limit on the use of operation and maintenance appropriations for the purchase of investment items. The Department of the Army has interpreted the removal of this statutory \$5,000 ceiling as allowing the \$15,000 ceiling in section 303 of the FY 1988/1989 DOD Authorization Act for fiscal years 1988 and 1989 to be reinstated.<sup>6</sup>

#### *Procurement of Supplies and Services from Exchange Stores Overseas*

Section 324 of the FY 1990/1991 DOD Authorization Act adds a new permanent provision<sup>7</sup> that permits the Department of Defense to enter into contracts with exchange stores (PX's) through other than competitive procedures, provided that: 1) the goods are in stock at the time the contract is awarded; 2) the contract does not exceed \$50,000; and 3) the goods support the Armed Forces outside the United States.

#### *Defense Contract Auditors*

In a section sure to be warmly received by the defense industry, section 335 of the FY 1990/1991 DOD Authorization Act requires DOD to add more auditors to DCAA by 30 September 1990. Last year, section 307 of the FY 1989 DOD Authorization Act required DOD to increase the number of DCAA audit and support personnel to not less than 7,007. Under this year's section 335, the agency grows to 7,457, of which not less than 6,488 shall be full-time auditors.

#### *Provision of Off-Duty Postsecondary Education Services Overseas*

Section 1212 of the Department of Defense Authorization Act, 1986,<sup>8</sup> prohibited the limiting of the number of offerors of off-duty postsecondary education classes to a single institution, with an exception for when it is necessary to do so in order to avoid unnecessary duplication. Section 518 of the FY 1990/1991 DOD Authorization Act requires DOD to study and to report to Congress by 1 March 1990 whether its policies and

procedures in effect are consistent with this restriction and whether the needs of service members and others stationed overseas are being adequately served. This provision is a result of a denied protest involving the change in the status of certain colleges serving military bases.

#### *Retention of Funds at Military Medical Facilities*

Section 727 of the FY 1990/1991 DOD Authorization Act authorizes military medical facilities to credit to their operation and maintenance accounts the money that they collect from third parties for inpatient hospital care. This is an example of an agency identifying a source of revenue and obtaining statutory authorization to retain the funds, rather than deposit them back into the miscellaneous receipts account of the U.S. Treasury as required by 31 U.S.C. § 3302. Installation attorneys should look for these additional sources of funds and, where appropriate, propose legislation to allow the installation to retain them.

#### *Operational and Live-Fire Test and Evaluation*

Section 802 of the FY 1990/1991 DOD Authorization Act adds a new permanent provision<sup>9</sup> that restricts major programs from going beyond low-rate initial production before completing operational test and evaluation. Section 802 also limits contracting for advisory and assistance services with contractors who have an organizational conflict of interest.<sup>10</sup> Section 804 of the FY 1990/1991 DOD Authorization Act adds a related provision regarding live-fire testing programs. Both provisions reflect ongoing congressional concerns about full-scale production of weapons that do not work. To correct this problem, Congress has decided to limit production to a low rate until operational and live-fire testing are completed. Therefore, these limitations need to be addressed when negotiating a major program's full-scale engineering development contract.

#### *Multiyear Procurement Contracts*

Section 805 of the FY 1990/1991 DOD Authorization Act amends 10 U.S.C. § 2306(h) to codify requirements for multiyear contracts. The multiyear contract must have a demonstrated cost savings of at least ten percent over projected annual contracts, a reduction from the twelve percent savings previously required by Congress.<sup>11</sup> The President, however, may now request a waiver of this ten percent cost savings requirement, where the dollar savings would nevertheless be substantial. Section 805 also requires the Secretary of Defense to make determinations regarding future funding and economic production rates.

<sup>5</sup> Pub. L. No. 100-180, 101 Stat. 1019 (1987).

<sup>6</sup> Message, HQ, Dep't of Army, SAFM-BUD-A, 242018Z Aug 89, Subject: Expense/Investment Criteria for OMA.

<sup>7</sup> 10 U.S.C. § 2424.

<sup>8</sup> Pub. L. No. 99-145, 99 Stat. 726 (1985) (codified at 10 U.S.C. § 133).

<sup>9</sup> 10 U.S.C. § 2399.

<sup>10</sup> 10 U.S.C. § 2399(c) and (d).

<sup>11</sup> See FY 1989 DoD Authorization Act, § 107.

*Availability of Funds for Obligation Following the Resolution of a Protest*

Section 813 of the FY 1990/1991 DOD Authorization Act adds 31 U.S.C. § 1558, which states that funds for a protested solicitation or contract available for obligation when a protest is filed shall remain available for obligation for a period of 90 working days following the date of the final ruling on the protest. This provision applies to *all* federal agencies and should help alleviate the pressure to obligate expiring funds for other, perhaps imprudent, contracts at the end of a fiscal year.

*Procurement Integrity Post-Employment Restrictions*

Section 814 of the FY 1990/1991 DOD Authorization Act substantially revised some of the key definitions concerning the post-employment restrictions from last year's Office of Federal Procurement Policy Act Amendments of 1988.<sup>12</sup> These revisions are discussed at length below in the "Fraud and Related Matters" section under the title "Procurement Integrity."

*Simplified Approval of Contracts Implementing Certain International Agreements*

Section 817 of the FY 1990/1991 DOD Authorization Act amends 10 U.S.C. § 2304(f) to permit the head of a contracting activity to approve a simplified justification and approval (J&A), regardless of the dollar amount involved, for a noncompetitive acquisition required by an international agreement. Section 818 of the FY 1990/1991 DOD Authorization Act amends the same section to authorize the Service Secretaries to delegate the authority to approve J&A's to a general officer or to a GS-16 and above. This applies to acquisitions between \$10 and \$50 million.

*Collusive Bidding Overseas*

Section 821 of the FY 1990/1991 DOD Authorization Act directs the Secretary of Defense to change the DFARS on collusive bidding certificates. The new rules will require contractors proposing to perform a contract outside the United States to certify that they have not engaged in collusive bidding. This apparently responds to some problems that the Navy has experienced with Japanese construction contractors. This certification requirement already exists for contracts to be performed in the United States.<sup>13</sup>

*Uniform Rules on Dissemination of Acquisition Information*

Section 822 of the FY 1990/1991 DOD Authorization Act requires that the DFARS prescribe a uniform policy regarding the dissemination of, and access to, acquisition information. The regulatory change must be made within 120 days of the enactment of the Act. This provision

reflects congressional and industry concern that the individual services have inconsistent policies in this area.

*Buy American Act*

Many allies have agreements that provide for reciprocal blanket waivers of the Buy America Act<sup>14</sup> for various products. Section 823 of the FY 1990/1991 DOD Authorization Act authorizes the Secretary of Defense to rescind his blanket waiver of the Act for any foreign country that engages in unfair trade practices.

*Acquisition of Commercial and Nondevelopmental Items*

Congress intended section 824 of the FY 1990/1991 DOD Authorization Act to remove perceived barriers to the efficient acquisition of commercial and nondevelopmental items. The section directs the Secretary of Defense to develop a simplified commercial product contract within nine months, to eliminate impeding regulations, and to prepare a report to Congress. Section 824 also establishes a demonstration program for the acquisition of military uniform items.

*Small Disadvantaged Business Goal*

Section 831 of the FY 1990/1991 DOD Authorization Act extends through Fiscal Year 1993 the goal of contracting not less than five percent of DOD contract dollars with small disadvantaged businesses. This goal was originally established in section 1207 of the FY 1987 DOD Authorization Act.<sup>15</sup> Balancing this goal, however, is section 832 of the FY 1990/1991 DOD Authorization Act, a provision allowing DOD to count contracts with Indian firms against this goal.

*Comprehensive Small Business Subcontracting Plans*

Section 834 of the FY 1990/1991 DOD Authorization Act authorizes a test program for the use of comprehensive subcontracting plans in an attempt to determine whether these will increase business opportunities for small businesses. Rather than having to negotiate and administer individual subcontracting plans for each contract, prime contractors will now be allowed to submit subcontract plans on a company-wide or a division-wide basis. However, a prime contractor's failure to make a good faith effort to meet the goals promised in its plan may subject the contractor to liquidated damages, a provision that is very controversial with industry.

*Protection of Intellectual Property Rights*

Section 852 of the FY 1990/1991 DOD Authorization Act suggests that the Secretary of Defense refrain from acquiring goods and services from countries that do not adequately protect intellectual property rights and imposes certain reporting requirements. Acquisitions from certain Asian nations with poor records of protecting intellectual property are at risk.

<sup>12</sup> Pub. L. No. 100-679, 102 Stat. 4068 (1988).

<sup>13</sup> See Fed. Acquisition Reg. 52.203-2 [hereinafter FAR].

<sup>14</sup> 41 U.S.C. §§ 10a-10d.

<sup>15</sup> Pub. L. No. 99-661, 100 Stat. 3973 (1986).

### *Authority of Installation Commanders Over Contracting for Commercial Activities*

Section 1111 of the FY 1988/1989 DOD Authorization Act<sup>16</sup> required the Secretary of Defense to delegate to each installation commander the authority to decide which commercial activities at the installation will be reviewed under the commercial activities procedures and when they would be reviewed. Commonly known as the "Nichols Amendment," this provision was to expire on 1 October 1989, but section 1131 of the FY 1990/1991 DOD Authorization Act extended it for one more year until 30 September 1990. Section 1131 also codified this authority at 10 U.S.C. § 2468. The Conference Report also requires DOD to submit a report by 1 June 1990 that describes the impact of making this legislation permanent.<sup>17</sup>

### *Use of the "M" Account*

Section 1603 of the FY 1990/1991 DOD Authorization Act adds a new permanent provision<sup>18</sup> that limits DOD's access to the "M" accounts. Under this new provision, the Service Secretary must determine that it is necessary and must approve all restorals from expired funds exceeding \$4 million for a particular program in one fiscal year. Additionally, if the amount restored for a particular program in one fiscal year exceeds \$25 million, the Secretary of Defense must notify the Armed Services and Appropriations Committees and must wait thirty days before restoring the funds. These restrictions are in response to the Air Force's attempt to use over \$500 million of "M" Account funds to pay for changes in the B-1B bomber program.<sup>19</sup>

### *National Competitiveness Technology Transfer Act of 1989*

Section 3131 of the FY 1990/1991 DOD Authorization Act amends the technology transfer provisions of the Stevenson-Wydler Act.<sup>20</sup> This reflects a strong congressional policy to promote the transfer of defense technology from government laboratories to the private sector. The amendments are intended to extend the benefits of the Stevenson-Wydler Act to federally-funded research and development laboratories, such as the Los Alamos and Lawrence-Livermore National Laboratories.

## *Department of Defense Appropriations Act, 1990*

### *General*

On 21 November 1989 President Bush signed into law the Department of Defense Appropriations Act, 1990, (hereinafter the Defense Appropriations Act, 1990)<sup>21</sup> which closely parallels the FY 1990/1991 DOD Authorization Act. The Defense Appropriations Act, 1990, appropriates \$286 billion in budget authority for fiscal year 1990 for all DOD programs other than military construction and military family housing, which are provided for in the Military Construction Appropriations Act, 1990.<sup>22</sup> Continuing a trend started in 1985, budget authority for DOD again declined in "real terms."<sup>23</sup> Some of the more important provisions for acquisition attorneys follow.

### *Obligation Rates*

Congress once again directed DOD to meet obligation rates and to avoid year-end spending. Section 9007 of the Defense Appropriations Act, 1990, states that no more than twenty percent of the annual (one-year) appropriations provided in the Act may be obligated during the last two months of fiscal year 1990. This section does not apply to obligations incurred in support of active duty training of Reserve components, summer camp training for the Reserve Officer Training Corps, or the National Board for the Promotion of Rifle Practice, Army.

### *Contracts to Recover Indebtedness*

Section 9019 of the Defense Appropriations Act, 1990, authorizes DOD to enter into contracts to recover indebtedness to the United States pursuant to the Debt Collection Act.<sup>24</sup> The Debt Collection Act Amendments of 1986<sup>25</sup> had previously given this authority only to the Attorney General.

### *Multiyear Procurement Contracts*

Section 9021 of the Defense Appropriations Act, 1990, prohibits the obligation of funds to execute a multiyear contract that includes any economic order quantity or unfunded contingent liability in excess of \$20,000,000, unless the House and Senate Armed Services and Appropriations Committees are notified in advance. Section 9021 also specifically states that no funds shall be

<sup>16</sup> Pub. L. No. 100-180, 101 Stat. 1019 (1987).

<sup>17</sup> H.R. Conf. Rep. No. 331, 101st Cong., 1st Sess. 649 (1989).

<sup>18</sup> 10 U.S.C. § 2782.

<sup>19</sup> H.R. Conf. Rep. No. 331, 101st Cong., 1st Sess. 666 (1989).

<sup>20</sup> 15 U.S.C. § 3710a.

<sup>21</sup> Pub. L. No. 101-165, 103 Stat. 1112 (1989).

<sup>22</sup> Pub. L. No. 101-148, 103 Stat. 920 (1989).

<sup>23</sup> H.R. Conf. Rep. No. 345, 101st Cong., 1st Sess. 156 (1989).

<sup>24</sup> 31 U.S.C. § 3718.

<sup>25</sup> Pub. L. No. 99-578, 100 Stat. 3305 (1986).

available to initiate a multiyear procurement contract for any system or component thereof if the value exceeds \$500,000,000, unless specifically provided for in the Act. Also, section 9021 requires ten days advance notification to the House and Senate Armed Services and Appropriations Committees of any termination of a multiyear procurement contract.

#### *Congressional Lobbying*

Section 9026 of the Defense Appropriations Act, 1990, prohibits the use, both direct and indirect, of any funds from this Act to influence congressional action on any legislation or appropriation matters pending before Congress. Presumably, this provision will not be so broadly interpreted so as to restrict the normal course of communication between DOD officials and Congress, such as when officials testify before Congress on government time.

#### *Dogs and Cats*

Section 9028 of the Defense Appropriations Act, 1990, states that none of the funds appropriated by the Act shall be used to either purchase dogs or cats or to otherwise fund the use of dogs or cats for the purpose of training DOD students or other personnel in surgical or other medical treatment of wounds produced by any type of weapon.

#### *Commercial Activities Program*

Section 9036 of the Defense Appropriation Act, 1990, requires that a management study to determine the most efficient organization (MEO) of an activity or function containing more than ten DOD civilian employees be conducted before that activity or function may be converted to contractor performance.

The Conference Report on the Defense Appropriations Act, 1990, expresses significant congressional dissatisfaction with the length of time and the cost of completing many cost studies. To reduce the overall costs of these studies to the government, the conferees have directed that ongoing studies exceeding the standard completion time (two years for single function studies and four years for multi-function studies) must reach an initial decision to keep the work in-house or to contract it out by 31 August 1990. Those that are not must be terminated and converted to the government's MEO, and the Secretary of Defense must report these terminated studies to Congress. Additionally, for future cost studies, standard completion times must be established of not more than two years for single function studies and not more than four years for multi-function studies. Those that exceed these times must be reported.<sup>26</sup>

#### *Fixed Price Development Contracts*

Section 9048 of the Defense Appropriations Act, 1990, contains the annual restriction on the use of fixed price development contracts in excess of \$10,000,000 for the development of a major system or subsystem unless the Under Secretary of Defense for Acquisition determines

in writing that program risk has been reduced to the extent that realistic pricing can occur and that the contract type permits an equitable adjustment and sensible allocation of program risk between the contracting parties. The authority to make this determination may not be delegated below the level of Assistant Secretary of Defense. Also, the Secretary of Defense must notify the Appropriation Committees of the House and Senate at least thirty days in advance of any such determination, to include an explanation of the reasons therefor.

#### *Unsolicited Proposals for Studies, Analyses, or Consulting Services*

Section 9078 of the Defense Appropriations Act, 1990, contains the annual prohibition against contracts for studies, analyses, or consulting services entered into without competition on the basis of unsolicited proposals unless the responsible head of the activity makes certain acquisition determinations: 1) as a result of thorough technical evaluation, only one source is found fully qualified to perform the proposed work; or 2) the purpose of the contract is to explore an unsolicited proposal that offers significant scientific or technological promise, represents the product of original thinking, and was submitted in confidence by one source; or 3) where the purpose of the contract is to take advantage of unique and significant industrial accomplishment by a specific concern or to ensure that a new product or idea of a specific concern is given financial support. These determinations, however, are not necessary for small purchases or when it would not be in the interest of national defense.

#### *Vessels, Aircraft, and Vehicles*

Section 9081 of the Defense Appropriations Act, 1990, prohibits DOD from using funds available during the current fiscal year and future fiscal years to enter into, extend, or renew any contract for a term of eighteen months or more, for any vessels, aircraft or vehicles, through a lease, charter, or similar agreement, without previously submitting the contract to the House and Senate Committees on Appropriations during the budgetary process. Section 9081 does not indicate where it will be codified, however.

#### *Prohibition on the Acquisition of Toshiba Products*

Section 9087 of the Defense Appropriations Act, 1990, continues last year's prohibition in section 8092 of the FY 1989 DOD Appropriations Act<sup>27</sup> of the purchase or sale in exchanges, concessionaires, or other DOD resale activities of all Toshiba Corporation products (except microwave ovens produced in the United States). This prohibition is to remain in effect until 28 December 1991.

#### *Nonappropriated Fund Instrumentalities*

Section 9093 of the Defense Appropriations Act, 1990, continues for another year the annual requirement that no appropriated fund support can be given to a nonap-

<sup>26</sup> H.R. Conf. Rep. No. 345, 101st Cong. 1st Sess. 27-28 (1989).

<sup>27</sup> Pub. L. No. 100-463, 102 Stat. 2270 (1988).

appropriated fund activity that procures malt beverages and wine for resale on a military installation in the United States unless the beverage or wine was purchased from a source within the state (or District of Columbia) in which the military installation is located.

#### *Depot Maintenance and Repair of Vessels, Aircraft, and Vehicles*

Section 9098 of the Defense Appropriations Act, 1990, allows DOD, during the current fiscal year, to acquire the depot maintenance and repair of vessels, aircraft, or vehicles through competition between DOD depot maintenance activities and private firms.

#### *Use of the "M" Account*

The Conference Report expressed displeasure in the way that the Air Force had attempted to use \$238 million from the "M" Account to offset shortfalls incurred in the Air Force Stock Fund's fuel accounting system. After directing the Air Force to reimburse the "M" Account this amount from its operation and maintenance appropriations over the next four fiscal years, the conferees directed the Secretary of Defense to develop more stringent guidelines for the use of "M" Account funds and to report to Congress every six months each use of "M" Account funds during that six-month period.<sup>28</sup>

#### *Defense Management Review Savings*

The Conference Report states that the conferees agreed to reduce the services' operation and maintenance appropriations by \$286 million and their Military Personnel appropriations by \$71 million for savings purportedly to be attained through the implementation of the Defense Management Review (DMR).<sup>29</sup> This cut supposedly will give the services an incentive to implement the DMR.<sup>30</sup>

### *Military Construction Appropriations Act, 1990*

#### *General*

On 10 November 1989, President Bush signed into law the Department of Defense Military Construction Appropriations Act, 1990.<sup>31</sup> Only a few provisions are of real interest to procurement attorneys.

#### *Base Closure*

Congress appropriated \$500 million for the Base Closure and Realignment Account. The appropriation includes a proviso that none of the funds may be

obligated for activities that would cause the total costs of base closure construction to exceed \$2.4 billion. This demonstrates that Congress is serious about both closing bases and controlling the costs of doing so.

#### *Cost-Plus-Fixed-Fee Contracts*

Section 101 of the Military Construction Act, 1990, prohibits the use of funds appropriated under this Act for any cost-plus-fixed-fee contract exceeding \$25,000 within the United States.

#### *Exercise-Related Construction*

Section 114 of the Military Construction Act, 1990, requires the Secretary of Defense to notify the House and Senate Armed Services and Appropriations Committees not less than thirty days prior to any exercise if the amounts expended for construction, temporary or permanent, are projected to exceed \$100,000.

### *Litigation*

#### *Jurisdiction*

#### *Claims Court Lacks Jurisdiction to Conduct Hearings Overseas*

The Court of Appeals for the Federal Circuit held in *In re United States*<sup>32</sup> that the U.S. Claims Court does not have the authority to conduct hearings and take evidence overseas. The Claims Court had ruled that Rule 39(a) of its rules of practice justified its position because the rule permits the court to decide the location for a hearing. The Federal Circuit rejected this reasoning and noted that several United States Code sections<sup>33</sup> contain language that limits the Claims Court's jurisdiction to conduct hearings and take evidence abroad.

#### *Essence of the Claim*

In *Winding Specialists Company*<sup>34</sup> the board dismissed the contractor's appeal because the claim was not for a sum certain. The contractor argued that its claim involved only a dispute over contract interpretation and that no dollar amount was necessary. The board held that where the essence of a dispute is the increased cost of performing the additional work, it is a monetary dispute and the claim must include a demand for a specific dollar amount.<sup>35</sup>

#### *Alternate Theories Are Claims*

The ASBCA ruled that a contractor's alternate theories of recovery were separate claims in *Christopher D.*

<sup>28</sup> H.R. Conf. Rep. No. 345, 101st Cong., 1st Sess. 20-21 (1989).

<sup>29</sup> H.R. Conf. Rep. No. 345, 101st Cong., 1st Sess. 23 (1989).

<sup>30</sup> The Defense Management Review is discussed more fully below in the "Potpourri" section under the title "Defense Management Review."

<sup>31</sup> Pub. L. No. 101-148, 103 Stat. 920 (1989).

<sup>32</sup> 877 F.2d 1568 (Fed. Cir. 1989).

<sup>33</sup> Specifically, 28 U.S.C. § 173 ("citizens"); 28 U.S.C. § 2503(c) ("counties"); 28 U.S.C. § 2505 ("anyplace within the United States").

<sup>34</sup> ASBCA No. 37765, 89-2 BCA ¶ 21,737.

<sup>35</sup> See also Shirley Construction Corporation, ASBCA No. 35868, 89-2 BCA ¶ 21,590.

*Constantinidis Construction, Company, S.A.*<sup>36</sup> Noting that the alternate theories were dependent upon factual matters different from the original claims, the board held that the theories constituted separate claims not previously presented to and considered by the contracting officer.

#### *Exercise of an Option Is a Government Claim*

A contract modification in which the government exercised an option at a price the contractor had declared non-binding is an appealable final decision. In *Boeing Company*<sup>37</sup> the board found that the contractor's protest over the exercise of the option had ripened into a full-blown dispute before the contracting officer issued the unilateral modification. The board therefore held that the unilateral modification was a contracting officer's final decision asserting a government claim.

#### *When Is a Contractor's Letter to the Contracting Officer Proper Notice of an Intent to Appeal?*

In *Stewart-Thomas Industries, Inc.*<sup>38</sup> the board held that the contractor's letter to the contracting officer advising him that it was in the process of filing an appeal with either the ASBCA or the U.S. Claims Court was not an effective notice of intent to appeal to the board. The board stated that "a notice of appeal must express an election to appeal to this Board" for it to be sufficient. The board found that the contractor's letter did not make a clear election of forums. In a similar case, *McNamara-Lunz Vans & Warehouses, Inc.*,<sup>39</sup> the board held that a letter that stated "we will appeal your decision through the various avenues open to us" was sufficiently clear to constitute an appeal to the board. The final decision advised the contractor that it could either "appeal" to the ASBCA or "bring an action" in the U.S. Claims Court. The board found that the contractor's use of the word "appeal" was an unequivocal intent to appeal to the board.

#### *Nonmonetary Claim*

In *Martin Marietta Corporation*<sup>40</sup> the board held that it had jurisdiction over a contractor's claim that allocations to its cost reimbursement contracts were not a change in its cost accounting practice. The allocations had been paid on DOD contracts, but the Federal Aviation Agency disallowed them. The contractor presented to the DOD-appointed Corporate Administrative Contracting Officer (CACO) a written demand for a final decision holding that the cost allocations did not involve a change in its cost accounting practice. When the CACO failed to issue a decision, the contractor appealed the "deemed denial." The government con-

tended that the appeal involved a dispute essentially under FAA rather than DOD contracts. The board ruled that the contractor's request was a proper claim under the DOD contracts. The board considered the contractor's request to be a demand for interpretation of contract terms or other relief, as provided for in the disputes clause's definition of a "claim." The board stated that the contractor was entitled to know where it stood with respect to these allocations on its DOD contracts.

#### *Certification*

##### *Reduction in Amount Claimed at the Board to Avoid Lack of Certification*

In *Building Systems Contractors, Inc.*<sup>41</sup> the board held that it lacked jurisdiction over an appeal involving a claim for \$39,563.58, which, when presented to the contracting officer, was for \$76,217.03 and was not properly certified. The contractor urged the board to hold that a claim that is under the \$50,000 certification threshold at the board level and that had been reasonably reduced based upon further information is retroactively immune from certification, even though it was over \$50,000 when presented to the contracting officer. The board stated that to hold that a claim reduction after a final decision confers jurisdiction would violate the letter and purpose of the certification requirement. Furthermore, the board observed that a mistake of the magnitude in this case indicated that the degree of care and reasonable precision that the certification requirement was designed to encourage was not applied to the original calculation.

##### *Incorporation of Statutory Certification Language by Reference*

In *Chester P. Schwartz, Gary A. Mosko, and Stanley H. Marks*<sup>42</sup> the board rejected the contractor's argument that a certification that incorporates by reference the statutory language was sufficient to confer jurisdiction. The board noted that the Contract Disputes Act requires a contractor to make specific, personal affirmations. A certification that incorporates statutory language merely by reference does not provide any assurances that the signers were even aware of the text referred to. This is especially true when, as in this case, an attorney prepared the certification.

##### *Who May Sign Certification*

In *Ball, Ball & Brosamer, Inc. and Ball & Brosamer (JV) v. United States*<sup>43</sup> the court held that a certification signed by a chief cost engineer with authority to sign and

<sup>36</sup> ASBCA Nos. 34393, 34394, 90-1 BCA ¶ 22,267.

<sup>37</sup> ASBCA No. 37579, 89-3 BCA ¶ 21,992.

<sup>38</sup> ASBCA No. 38773, 90-1 BCA ¶ \_\_\_\_ (28 Nov. 1989).

<sup>39</sup> ASBCA No. 38057, 89-2 BCA ¶ 21,636.

<sup>40</sup> ASBCA No. 38920, 90-1 BCA ¶ \_\_\_\_ (30 Oct. 1989).

<sup>41</sup> VABCA Nos. 2749, 2779, 89-2 BCA ¶ 21,678.

<sup>42</sup> VABCA No. 2856, 89-2 BCA ¶ 21,681.

<sup>43</sup> 878 F.2d 1426 (Fed. Cir. 1989).

certify claims on behalf of the contractor did not meet the Contract Disputes Act certification requirement. The court's decision was based upon the provisions of FAR 33.207(c)(2), which provides that when the contractor is not an individual, a certification must be executed by a senior company official "in charge at the contractor's plant or location involved" or by an officer having "overall responsibility for the conduct of the contractor's affairs." Although the engineer may have been a senior company official, he failed to meet the remainder of the regulatory requirements for executing certifications.

#### *Timeliness*

##### *Notice of Appeal to Contracting Officer Is Not Filing With Board*

In *Doris Bookout*<sup>44</sup> the board held that a mailing of a notice of appeal to the contracting officer or other departmental official is *not* a filing with the board. The contractor mailed its notice of appeal, which was addressed to the board, to the contracting officer within the 90-day filing period. The board noted that timeliness is determined by the date of mailing of an appeal. While the board acknowledged that other boards have considered appeals timely when filed with the contracting officer or other officials, the board concluded that to follow such decisions would be to arbitrarily pick those who may act as agents for the board or to accept an appeal no matter where or with whom it is filed. The board therefore dismissed the appeal as untimely because it was not mailed to the board within the requisite time period.<sup>45</sup>

#### *Reconsideration*

The Claims Court held in *Information Systems & Networks Corporation v. United States*<sup>46</sup> that the contracting officer's memorandum to agency counsel, which stated that his final decision had been correct, even though it had been based upon the wrong reasons, did not constitute a reconsideration of the final decision. The court noted that the contracting officer wrote the memorandum to the agency counsel in response to a request for assistance after an appeal had been filed with the Agriculture BCA, which was later dismissed as untimely. The memorandum also merely included the contracting officer's personal opinion that newly received information supported his decision to deny the

claim, and it did not state or purport to be a reconsideration.

#### *Terminations*

##### *Convenience Termination Proposal Is a Claim*

In *Tom Shaw, Inc.*<sup>47</sup> the board held that a convenience termination settlement proposal is a claim at time of its submission, assuming that it is properly certified and that is for a sum certain. The board declined to follow other board precedent, *Hugh Auchter GmbH*,<sup>48</sup> which held that a termination settlement proposal is not a claim, even if certified, if it does not involve a pre-existing dispute over costs included in the proposal. The board observed that the disputes clause does not require that the government dispute a contractor's claim at the time of submission for it to qualify as a claim. Furthermore, the board stated that a termination proposal is not a "routine request for payment."<sup>49</sup> Accordingly, the board rejected the government's position that the settlement proposal was not a claim.

In *BVR, Inc.*<sup>50</sup> the board held that a contractor's letter, which requested a final decision and properly certified its previously submitted convenience termination proposal, was a claim. The board stated that it does not generally consider termination settlement proposals to be claims. In this case, however, the letter followed a period of ten months during which the parties failed to resolve the matter. Under these conditions, the board concluded that the letter constituted a claim.

##### *Convenience Termination Not a Bar to Government Offsets for Corrective Work*

In *Aydin Corporation*<sup>51</sup> the board held that a convenience termination is not a bar to government offset claims for incomplete or uncorrected work performed prior to the termination. The board acknowledged that it was refusing to follow the rule set forth in *New York Shipbuilding Company*,<sup>52</sup> which held that offset claims for corrective work are not recoverable where there have been convenience terminations. It also stated that even if *New York Shipbuilding* was correct, in that case the termination occurred early in the life of the contract. The court noted that *New York Shipbuilding* did not apply where the termination occurs late in performance and the contractor has had an opportunity to correct the deficiencies.<sup>53</sup>

<sup>44</sup> AGBCA No. 89-147-1, 89-1 BCA ¶ 21,570.

<sup>45</sup> *But see* Brunner Bau GmbH, ASBCA No. 35678, 89-1 BCA ¶ 21,315 (mailing of notice to appeal to government counsel is considered a filing with the ASBCA).

<sup>46</sup> 17 Cl. Ct. 527 (1989).

<sup>47</sup> ENG BCA Nos. 5540, 5541, 89-3 BCA ¶ 21,961.

<sup>48</sup> ASBCA No. 33123, 88-3 BCA ¶ 20,926.

<sup>49</sup> *See* FAR 33.201 and 52.233-1(c), which exclude routine requests for payment from the definition of a "claim."

<sup>50</sup> ASBCA No. 38758, 90-1 BCA ¶ \_\_\_\_\_ (20 Sept. 1989).

<sup>51</sup> EBCA No. 355-5-86, 89-3 BCA ¶ 22,044.

<sup>52</sup> ASBCA No. 15443, 73-1 BCA ¶ 9852.

<sup>53</sup> *See also* Air Cool, Inc., ASBCA No. 32838, 88-1 BCA ¶ 20,399, wherein the ASBCA questioned the further applicability of the *New York Shipbuilding* decision in light of *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987) (offset claim denied on the merits; court declined to follow *New York Shipbuilding*).

### *Late May Never Be Late*

In *Sosa y Barbero Constructores, S.A., CIA. Internacional De Seguros, S.A., and Misener Marine Construction, Inc.*<sup>54</sup> the board held that the contractor's failure to appeal the default termination of its contract in a timely manner did not bar its prospective differing site conditions and constructive changes claims. The government contended that the contractor's claims all tended to excuse the default and were therefore barred because the contractor failed to appeal the government's default termination in a timely manner, which necessarily concluded that there were no excusable events. The board stated, however, that a government claim of default and a contractor affirmative claim based upon compensable events are separate claims. The board concluded that the contractor had not submitted its prospective claims as of the date of the termination. Accordingly, the contractor's claims were not barred by its failure to appeal the default termination.

### *Bars to Claims*

#### *Collateral Estoppel*

In *Westerchil Construction Company v. United States*<sup>55</sup> a contractor who had been held liable to a subcontractor under a Miller Act action<sup>56</sup> brought an action to recover against the government. The Claims Court held that the government was not collaterally estopped by the prior Miller Act action. In *United States ex rel. Karnes Roofing Company v. Westerchil Construction Company and Federal Insurance Company*<sup>57</sup> the subcontractor successfully sued the contractor and its surety under the Miller Act for payment for complying with an order from the government and the contractor to rebuild a roof. The district court found that the government witnesses were without credibility and that the government's decision to have a roof removed and rebuilt rather than repaired was arbitrary. Under the law of collateral estoppel, once a court of competent jurisdiction has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based upon a different cause of action involving a party to the prior litigation. The Claims Court held that the prior action did not collaterally estop the government because it was not a party in that litigation. The court stated that the fact that the Miller Act action is brought in the name of the United States is not controlling; the

Miller Act requires that suits be brought in the name of the United States so as to expand service of process and jurisdiction.<sup>58</sup> Because the United States was only a nominal party and did not have an opportunity to litigate fully its position in the Miller Act action, the court held that collateral estoppel did not apply. On the merits, the court found that the government had acted within the scope of its authority and held against the contractor.

### *Settlement Agreements*

In *Kasel Manufacturing Company*<sup>59</sup> the board held that oral settlement agreements are not binding, thereby indicating that *Essex Electro Engineers, Inc.*,<sup>60</sup> which had held otherwise, would not be controlling. The board's decision in *Kasel* was based upon the requirement in DAR 1-201.4 and 26-302 that contract modifications be in writing to be binding. Contract modifications include bilateral actions such as supplemental agreements. The board's decision is also in accord with *Mil-Spec Contractors, Inc. v. United States*,<sup>61</sup> which held that oral settlement agreements must be reduced to writing (a Standard Form 30) to be binding.

In a similar case, the Claims Court held in *Robinson Contracting Company v. United States*<sup>62</sup> that the contractor was bound by a settlement agreement reflected by a signed memorandum executed at the conclusion of negotiations and the subsequent exchange of telegrams. The contractor, citing *Mil-Spec Contractors, Inc. v. United States*,<sup>63</sup> contended that there was no final accord and satisfaction because it refused to sign a Standard Form 30. The Claims Court distinguished *Mil-Spec Contractors, Inc.* and stated that *Mil-Spec* did not involve a written agreement executed by the parties. The court held that in the present case the execution of a Standard Form 30 was a mere formality that did not affect the finality of the accord and satisfaction.

### *Final Payment*

The board ruled in *Namoi Gray Associates, Inc.*<sup>64</sup> that the contractor's placement of the government's final payment in a separate trust account did not avoid the effect of a prior general release. The contractor argued that the subsequent request for additional funds operated as a withdrawal of its release because the payment had been placed in a separate trust account. The board held, however, that it was the release rather than the

<sup>54</sup> ENG BCA No. PCC-57, 89-2 BCA ¶ 21,754.

<sup>55</sup> 16 Cl. Ct. 727 (1989).

<sup>56</sup> 40 U.S.C. § 270b.

<sup>57</sup> No. 83-2893A (W.D. La. June 25, 1986).

<sup>58</sup> See 40 U.S.C. § 270b(b).

<sup>59</sup> ASBCA No. 26975, 89-1 BCA ¶ 21,464.

<sup>60</sup> ASBCA Nos. 30118, 30119, 88-1 BCA ¶ 20,440.

<sup>61</sup> 835 F.2d 865 (Fed. Cir. 1987).

<sup>62</sup> 16 Cl. Ct. 676 (1989).

<sup>63</sup> 835 F.2d 865 (Fed. Cir. 1987).

<sup>64</sup> GSBGA No. 9390-ED, 90-1 BCA ¶ \_\_\_\_\_ (13 Sept. 1989).

final payment that barred the subsequent submission of claims based upon events occurring prior to the execution of the general release.

#### *Release of Claims*

A recent ASBCA case points out the difficulty that the government may have in attempting to draft and execute a release from further liability for other claims when entering into a settlement agreement with a contractor. In *JDV Construction Inc.*<sup>65</sup> language in two contract modifications stated "the contractor hereby releases the government from any and all liability under this contract for further equitable adjustments including overhead . . . except for," which was followed by the contractor's handwritten word "none" and his initials. The board held that, despite this language, the contractor was entitled to an equitable adjustment for its *extended* overhead costs during the time required to complete the contract as modified. If the government had wanted to bar this claim for extended overhead, the board said that it should have drafted a more persuasive "boilerplate" provision that would have clearly manifested its intent and put the contractor on notice.

#### *Final Payment Not a Bar to Government Claim*

In *Design and Production, Inc. v. United States*<sup>66</sup> the Claims Court, although denying the government's counterclaim on the merits, held that the counterclaim was not barred by the doctrine of final payment and that it was filed within a reasonable time. The Claims Court held that the final payment rule bars assertion of claims after final payment only if the contract so specifies. Finding that the contract contained no such requirement, the Claims Court next considered the factors set forth in *Roberts v. United States*<sup>67</sup> to determine whether the government had asserted its claim within a reasonable time. In *Roberts* the Court of Claims held that to be made within a reasonable time, the government's action should be made within such time as to allow a contractor to appeal: 1) while the facts supporting the claim are readily available; and 2) before the contractor's position is prejudiced by final settlement with its subcontractors, suppliers, and other creditors. The court held that the mere passage of time, which was the contractor's only assertion, did not satisfy the conditions required by *Roberts*.

#### *Authority and Implied-In-Fact Contracts*

##### *Authority and Institutional Ratification*

In *City of El Centro v. United States*<sup>68</sup> the Claims Court denied a government motion for reconsideration

of the court's earlier holding that the plaintiff had established an implied-in-fact contract with the Immigration and Naturalization Service (INS) that entitled it to compensation for medical care rendered to fourteen illegal aliens at the behest of Border Patrol agents.<sup>69</sup> Notwithstanding government assertions to the contrary, the court held that the INS agent (not a contracting officer) who had arranged for the emergency treatment had the authority to obligate appropriated funds for that treatment based upon the emergency nature of the situation.<sup>70</sup> Next, the court determined that institutional ratification occurred on the basis of the acceptance of benefits (medical treatment of the aliens), which rendered the otherwise defective government contract enforceable. The court held that it is legally possible for a government agency to ratify an otherwise technically unauthorized commitment and that a particular ratifying official possessing contractual authority need not necessarily be identified to effectuate ratification.<sup>71</sup> Additionally, the government claimed that the initial opinion and order were void for lack of jurisdiction because the plaintiff had failed to comply with the Contract Disputes Act (CDA).<sup>72</sup> The court determined that the invoices requesting payment and the government response denying liability clearly demonstrated that the government was given adequate notice of the basis and amount of the plaintiff's claims. The invoices were therefore held to be "claims" within the meaning of the CDA, and the letters denying liability were deemed to be final decisions. Finally, plaintiff submitted fourteen separate claims (for medical expenses relating to the fourteen different patients), the aggregate totalling more than \$50,000. The government asserted that the plaintiff should have been required to certify the claims because they amounted to a unitary claim. The court disagreed and held that the plaintiff had not fragmented its claim to avoid the certification requirement.

#### *Oral Contracts*

In *Lance Dickinson & Co.*<sup>73</sup> the ASBCA held that the United States may be bound by an oral contract so long as the individual representing the government had the requisite contract authority. The contractor alleged that two express or implied-in-fact contracts resulted from oral agreements made with a government official to provide two separate training courses. The board found no impediment to enforcing oral contracts so long as they are executed by individuals with contracting authority. Ultimately, however, the board decided that it lacked jurisdiction to hear this appeal because the government official with whom the contractor dealt had no contracting authority.

<sup>65</sup> ASBCA No. 37937, 89-3 BCA ¶ 22,012.

<sup>66</sup> 18 Cl. Ct. 168 (1989).

<sup>67</sup> 357 F.2d 938, 174 Cl. Ct. 940 (1966).

<sup>68</sup> 17 Cl. Ct. 794 (1989).

<sup>69</sup> *City of El Centro v. United States*, 16 Cl. Ct. 500 (1989).

<sup>70</sup> This issue was not squarely decided in the initial opinion. See *El Centro*, 16 Cl. Ct. at 509.

<sup>71</sup> 17 Cl. Ct. at 798.

<sup>72</sup> 41 U.S.C. §§ 601-613.

<sup>73</sup> ASBCA No. 36804, 89-3 BCA ¶ 22,198.

### *Amount of Claim*

In *Reinhold Construction, Inc.*<sup>74</sup> the board rejected the contractor's amendment to its complaint that increased the amount of its claim from \$27,159 to \$55,120. The contractor had not shown that the increased amount of the claim was based upon information not reasonably available at the time it submitted its initial claim. Additionally, the board stated that the contractor's reservation of a right to increase the amount further was additional evidence that the claim was not sufficiently quantified.<sup>75</sup>

### *Discovery*

#### *Dismissal Not Always an Appropriate Sanction*

The Claims Court overturned a dismissal of an appeal for failure to comply completely with a board's pretrial order on proof of costs. The court found in *Griffin and Dickson v. United States*<sup>76</sup> that the Agricultural Board of Contract Appeals had abused its discretion in *Griffin and Dickson*<sup>77</sup> when, after more than ten years of pretrial litigation, the board dismissed the appeal with prejudice because the appellant's forty-one page submission only partially complied with the board's order to submit proof of its costs. The court stated that dismissal is an appropriate sanction only where a party's actions are abusive, egregious, and demonstrate a pattern of deliberate or flagrant disregard for a tribunal's authority. Here the contractor had promptly and repeatedly requested an opportunity to revise its submission, and less severe sanctions had not been shown to be ineffective.

#### *The Attorney-Client Privilege and the Freedom of Information Act*

The Armed Services Board of Contract Appeals underscored the importance of keeping a close eye on what is disclosed under the Freedom of Information Act<sup>78</sup> in cases likely to end up in litigation. In *Bruce Andersen Company, Inc.*<sup>79</sup> the government was found to have waived the attorney-client privilege as to several letters from government attorneys that commented on the legal issues of the case. The letters were therefore admissible evidence.

#### *Sanctions for Falsely Denying the Existence of a Document*

The ASBCA imposed discovery sanctions on the government, even though no discovery order had been

disobeyed, for falsely and deliberately denying the existence of a document during the discovery process. In *Charles G. Williams Construction, Inc.*<sup>80</sup> the board found that the falsehood misled the contractor into a belief that a technical evaluation report did not exist and violated the government's basic obligation of fair dealing during the discovery process. The government's deception prevented the contractor from seeking a discovery order. The board did not grant the sanctions that the contractor requested (e.g., judgment in the contractor's favor), but instead excluded the document and stated that it would disregard all testimony by the government witness who prepared the document.

### *Suspension of Proceedings*

*Aerospatiale Helicopter Corporation*<sup>81</sup> presented an unusual situation: the contractor requested suspension of the proceedings because of the possibility of a criminal investigation. The contractor's request for a six-month suspension was based on its contentions that the government was using the board's discovery process to locate documents relevant to a possible criminal investigation. Among other bases, the board granted the request because at least a portion of the discovery effort was directed towards support of the criminal investigation.

### *Post Hearing Briefs*

#### *No Filing of Amicus Briefs Permitted by the ASBCA*

In *Hughes Aircraft Co.*<sup>82</sup> the board held that Navy and the Defense Contract Audit Agency could not file amicus briefs in an appeal in which the government is represented by a different agency. The board stated that only one agency (in this case the Army) may represent the government in an appeal. The board concluded that input from other interested agencies should be coordinated with the office representing the government.

#### *Computer-Generated Material in Response to Testimony is Excluded From Consideration in Brief*

In *Frontier Contracting Company, Inc.*<sup>83</sup> the board decided that the government may not present computer-generated tabulations of data in its briefs that it did not produce at the hearing. The government stated that the charts were prepared in response to the contractor's testimony on the relationship between manpower on the project and progress on the project. Recognizing that the government is free to analyze data in the record and

<sup>74</sup> ASBCA Nos. 33312 *et al.*, 90-1 BCA ¶ \_\_\_\_\_ (6 Nov. 1989).

<sup>75</sup> See also *D.E.W., Incorporated*, ASBCA No. 35173, 89-3 BCA ¶ 22,008, where the board rejected an amendment to the complaint to increase the amount of a certified claim for the same reasons.

<sup>76</sup> 16 Cl.Ct. 347 (1989).

<sup>77</sup> AGBCA No. 74-104-4, 86-1 BCA ¶ 18,601.

<sup>78</sup> 5 U.S.C. § 552.

<sup>79</sup> ASBCA Nos. 29412, 32247, 89-2 BCA ¶ 21,872.

<sup>80</sup> ASBCA No. 33766, 89-2 BCA ¶ 21,733.

<sup>81</sup> DOTBCA Nos. 1905 *et al.*, 89-2 BCA ¶ 21,770.

<sup>82</sup> ASBCA No. 30144, 90-1 BCA ¶ \_\_\_\_\_ (24 July 1989).

<sup>83</sup> ASBCA No. 33658, 89-2 BCA ¶ 21,595, *mot. for recon. denied*, 89-2 BCA ¶ 21,802.

argue its implications, the board nevertheless held that the government had not adequately shown that the computer-generated materials were accurate summaries of the evidence in the record. Accordingly, the board struck the attachments from the record.

### *Equal Access to Justice Act*

#### *Background*

The Equal Access to Justice Act (EAJA)<sup>84</sup> allows eligible prevailing litigants to recover attorneys' fees and expenses where the government's position is not substantially justified. Applications for fees must be submitted within thirty days of final judgment. Fees awarded will not exceed the statutorily mandated limit of \$75 per hour unless a court or board determines that an increase in the cost of living or some special factors justifies a higher fee. The following cases are some of the more interesting decisions under the EAJA in 1989.

#### *Timeliness*

In *Adam Sommerrock Holzbau, GmbH v. United States*<sup>85</sup> the Court of Appeals for the Federal Circuit held that 5 U.S.C. § 504(c)(2), not 41 U.S.C. § 607(g)(1)(A), prescribes the applicable period for appeal from a board of contract appeals decision on an application for fees and expenses filed pursuant to 5 U.S.C. § 504. The court further held that the time for appeal begins to run from the date the prevailing party receives a copy of the decision. Because Holzbau filed its petition for review of the ASBCA's decision denying its fee application more than thirty days after the board issued its decision, the court lacked jurisdiction to review that decision.

In *Beta Systems Inc. v. United States*<sup>86</sup> the Court of Appeals for the Federal Circuit held that a prevailing party is not barred from filing a petition for recovery of attorneys' fees upon final appellate judgment accompanied by remand. Accordingly, fee petitions filed pursuant to 28 U.S.C. § 2412(d)(1)(B) must be filed within thirty days after "final judgement in the action" and, in those instances in which a remand to a lower court is ordered, it is appropriate that those petitions be filed after the appellate decision.

In *Barry v. Bowen*<sup>87</sup> the Secretary of Health and Human Services appealed a district court's finding of contempt and imposition of attorneys' fees for failing to pay plaintiff counsel's EAJA fees within thirty days. The district court imposed sanctions on HHS in the amount of \$100.00 per day for each day the fees and costs were

not paid after a certain date (which totalled \$2,200.00), plus interest (\$41.15) and attorneys' fees for the motion for sanctions (\$4,767.50). While the action was not styled as a contempt, the district court stated that the secretary was "in contempt."<sup>88</sup> The government asserted that the district court's award of monetary sanctions for contempt violated the sovereign immunity of the United States. Conversely, the plaintiff's counsel asserted that the EAJA waiver of sovereign immunity is broad enough to cover the sanction and fees to be recovered. The Ninth Circuit reversed the district court and held that monetary sanctions for contempt could not be imposed against the United States.

#### *Substantial Justification*

One of the elements of recovery under the EAJA is that the government's position is not "substantially justified." Last year we reported that we expected continued litigation on this issue.<sup>89</sup> We were not disappointed.

In *Jana, Inc.*<sup>90</sup> the appellant prevailed at the board in an earlier appeal, and the board held that it was entitled to recover certain legal services expenses as direct costs under the cost-plus-fixed-fee contract to provide technical publications services. Additionally, the board determined that the appellant was entitled to recover post-award protest-related fees and contract administration legal fees (pre-award protest-related legal fees were disallowed). Appellant contended that, as the prevailing party, its attorneys' fees and expenses should be paid under the EAJA. The board examined the interrelationship between the clarity of the existing law and the determination of substantial justification and concluded that the clearer the existing law, the more likely the private litigant will gain a favorable result. Conversely, if the governing law is unclear or in flux, it is more probable that the government's position will be substantially justified. The board concluded that the issue of the proper treatment of post-award legal expenses as direct costs was one of first impression and presented a close question. It observed that the government's position in contesting the costs as direct costs, while not prevailing in this case, could nevertheless be considered correct by a reasonable person.

In *Universal Restoration Inc., v. United States*<sup>91</sup> the Claims Court held that when examining whether the government's position is "substantially justified," the government's litigation position must be measured against the law as it existed when the government was litigating the case, rather than against new law enunci-

<sup>84</sup> 5 U.S.C. § 504.

<sup>85</sup> 866 F.2d 427 (Fed. Cir. 1989).

<sup>86</sup> 886 F.2d 1404 (Fed. Cir. 1989).

<sup>87</sup> 884 F.2d 442 (9th Cir. 1989).

<sup>88</sup> *Id.* at 443.

<sup>89</sup> See McCann, Norsworthy, Ackley, Aguirre, Mellies, and Munns, *Recent Developments in Contract Law—1988 in Review*, *The Army Lawyer*, Feb. 1989, at 5, 24.

<sup>90</sup> ASBCA No. 32447, 89-2 BCA ¶ 21,638.

<sup>91</sup> 16 Cl. Ct. 214 (1989).

ated at the conclusion of the case. The case, albeit atypical, presented a tortured history where the government first lost, then won (both at the ASBCA), and then ultimately lost (after remand to the board from the Court of Appeals for the Federal Circuit). In denying the petition, the court observed that the magnitude of the disagreement among jurists was persuasive evidence that the government was advancing a position that, although ultimately unsuccessful, had at least a "reasonable basis both in law and fact."<sup>92</sup>

In *Insul-Glass, Inc.*<sup>93</sup> the GSBICA ruled that even though Insul-Glass prevailed on the appeal, it was not entitled to attorneys' fees and costs because the case was one of first impression resulting in a new standard. As such, the government's position was not without justification. The board stated that the government could not have known that the board would read the law to find that the government had a duty to inquire.

#### *Prevailing Party*

In *Lear Siegler, Inc., Energy Products Div. v. Lehman*<sup>94</sup> a contractor sought declaratory and injunctive relief against the Navy after the failure of its bid protest seeking to hold the Navy to full compliance with the Competition in Contracting Act (CICA).<sup>95</sup> Based upon the advice of the Attorney General, the Navy had partly ignored some of the provisions of CICA. The U.S. Senate intervened in the contractor's action seeking to have CICA declared constitutional. The district court denied the contractor's request for injunctive relief and found the Navy to have constructively complied with CICA. Significantly, the district court did not initially reach the constitutional question presented. Subsequently, however, the district court ruled on the cross-motions for summary judgment submitted by the contractor, the Navy, and the Senate that CICA was constitutional. The district court granted no other relief to any party, including the contractor. The district court did, however, award the contractor attorneys' fees on the theory that the contractor had, in some sense, forced the Navy to follow the law. Absent were findings that the contractor was either a prevailing party or eligible for an EAJA award based on requisite size criteria. The district court ultimately granted the Navy's motion for summary judgment. On appeal, the Ninth Circuit was confronted with the issue of the propriety of the district court's award of attorneys' fees. The court was persuaded that the contractor had concentrated its efforts on the Navy's handling of its bid and the subsequent award proceedings, as opposed to the constitutional issue relating to CICA, which was championed by the Senate. The court therefore concluded that, at best, the contrac-

tor was on the prevailing side of the constitutional issue, but was not a prevailing party within the meaning of the EAJA. In sum, a party who expends little effort in litigating an issue cannot be held to be a prevailing party under EAJA, even when the issue is resolved in that party's favor.

#### *Fee Petitions and the Standard of Review*

In *Middlesex Contractors & Riggers, Inc.*<sup>96</sup> the board held that, despite the fact that an appellant's legal fees were paid on a contingent fee basis, EAJA fees in the amount of \$75.00 per hour and actual law clerk costs for the hours worked and related expenses would be awarded to the appellant as the prevailing party. Moreover, the board stated that it will exercise its discretion to accept as reasonable the applied for fees and expenses, without undertaking a detailed inquiry, when: 1) an eligible party prevails on a position where the government's position was not substantially justified; 2) the party carefully excludes all unallowable costs; 3) the time periods charged and allowable costs seem reasonable; and 4) it is clear that the amount sought will not compensate the party for even the majority of its appeal costs.

In *Insul-Glass, Inc.*<sup>97</sup> the board held, *inter alia*, that a contractor who prevailed in the underlying litigation was not entitled to attorneys' fees and costs because it failed to prove that it had a net worth of under \$7 million and fewer than 500 employees. The board held that the contractor had the burden of establishing its eligibility for recovering costs where the evidence demonstrated that the corporation was one of a large number of companies owned by the same group and that attorney bills were sent to an affiliated company at the same address. The contractor failed to provide any evidence on net worth or employment information for any of the affiliates of the company and thus failed to establish EAJA eligibility requirements. The board also denied payment on the ground that the special circumstances exception to paying attorneys' fees and costs to a prevailing party provides the board with discretion to deny awards where the award of those fees and costs would be unjust. Because the contractor's administration was as "bumbling and deficient" as the government's, both parties were held to have created the situation that gave rise to the termination and ultimate appeal. Therefore, an award of EAJA fees and costs would be unjust.

#### *Recoverable Expenses*

Librarian and LEXIS Expenses. In *Northwest Piping, Inc.*<sup>98</sup> the prevailing party sought recovery of 29.4 hours

<sup>92</sup> 16 Cl. Ct. at 218.

<sup>93</sup> GSBICA No. 9910-C (8223), 89-3 BCA ¶ 22,223.

<sup>94</sup> 28 U.S.L.W. 2081 (9th Cir. July 17, 1989) (No. 86-6496).

<sup>95</sup> 41 U.S.C. §§ 251-260.

<sup>96</sup> IBCA No. 2654-F, 89-3 BCA ¶ 22,186.

<sup>97</sup> GSBICA No. 9910-C (8223), 89-3 BCA ¶ 22,223.

<sup>98</sup> IBCA No. 2642-F, 90-1 BCA ¶ \_\_\_\_\_ (15 Nov. 1989).

of its attorney's time, 1.45 hours of a librarian's research time, and related expenses for delivery services (\$10.00) and for "LEXIS" research (\$29.00). The board allowed the expenses for the librarian and the LEXIS service, notwithstanding the fact that it found no cases dealing with the allocability of these types of expenses.

**Special Factors—Recognized Procurement Experts.** In *Cox Construction Co. v. United States*<sup>99</sup> the Claims Court held that a prevailing party may recover only those fees and expenses that were incurred in "civil actions"<sup>100</sup> and agency "adversary adjudications."<sup>101</sup> Therefore, a prevailing party may not recover fees and expenses attendant to prosecution of its certified claim before the contracting officer. The court also held that the plaintiff had failed to demonstrate the existence of any "special factors" that would warrant the award of fees in excess of the statutory maximum of \$75 per hour. Plaintiff contended that: 1) its attorneys were "recognized experts in Federal Procurement Construction Law," with over twenty-four years of experience; 2) the case was multifaceted, complex, and required working knowledge of, *inter alia*, accounting, structural steel, construction, and wiring principles; and 3) the case required counsel that could prepare a novel method of calculating delay damages. The court decided that procurement law is not "an identifiable practice specialty" within the meaning of *Pierce v. Underwood*,<sup>102</sup> but even if it were, specialization was not essential to the competent litigation of the case. To demonstrate the "special factor" of "limited availability of qualified attorneys," a plaintiff must demonstrate that it is the "nature of the case" and not the nature of the litigation strategy that renders "the proceeding capably handled by only a limited number of attorneys."<sup>103</sup> Plaintiff failed to demonstrate the existence of any "special factor" in the case. With respect to rate calculation, the court held that the plaintiff was entitled to receive an upward adjustment of the \$75 hourly rate based upon cost of living increases, that the Consumer Price Index figures for San Diego would be adopted, and that the \$75 hourly rate is a cap and not a floor. Therefore, for time billed at less than \$75 an hour, the plaintiff was entitled to receive only the rate actually charged.

## Protests

### Legislation

The major legislative change in the past year concerning protests is the statutory exception to the period of availability of appropriations for protested acquisitions. Section 813 of the FY 1990/1991 DOD Authorization Act<sup>104</sup> added a provision to Title 31<sup>105</sup> that states that funds for a protested solicitation or contract available for obligation when a protest is filed shall remain available for obligation for a period of 90 working days following the date of the final ruling on the protest (including reconsideration). 31 U.S.C. § 1558 applies to all federal agencies. This means that the funds reserved for an end-of-year procurement will not lapse if the procurement is protested. Agencies may no longer defend a protest by alleging that the funds have lapsed.<sup>106</sup> Also, agencies need not seek an override of the automatic stay or suspension simply to prevent the loss of funds.<sup>107</sup>

### General Accounting Office

#### GAO Rules of Procedure (4 C.F.R. Subpart 21)

In April 1989 the GAO sought comments on its 1988 rule changes and also asked for suggestions on improving its bid protest rules.<sup>108</sup> Comments were due by 1 June 1989. GAO has since tested some revisions to its protest procedures, such as modified fact-finding hearings and protective orders and nondisclosure agreements, but has implemented no new changes to its procedures.

#### Subject Matter of Protests

*Columbia Communications Corp.*<sup>109</sup> shows that the GAO does not review protests of government sales. In that protest the GAO declined to review a sale of satellite communications services.

In *Utah Precision, Inc.—Request for Reconsideration*<sup>110</sup> the Comptroller General stated that it would not review a solicitation to perform services with government personnel absent a competitive solicitation issued for cost comparison purposes under OMB Circular A-76.

<sup>99</sup> 17 Cl. Ct. 29 (1989).

<sup>100</sup> See 28 U.S.C. § 2412(d)(A).

<sup>101</sup> See 5 U.S.C. § 504(a)(1)(I).

<sup>102</sup> 108 S. Ct. 2541 (1988).

<sup>103</sup> *Cox*, 17 Cl. Ct. at 36.

<sup>104</sup> Pub. L. No. 101-189, 103 Stat. 1352 (1989).

<sup>105</sup> 31 U.S.C. § 1558.

<sup>106</sup> See, e.g., MZP, Inc., Comp. Gen. Dec. B-224838 (11 Feb. 1987), 87-1 CPD ¶ 150 (bid protest costs awarded where funds expired and requirement cancelled).

<sup>107</sup> See *Federal Technology Corp.*, GSBGA No. 10188-P, 89-3 BCA ¶ 22,134.

<sup>108</sup> 54 Fed. Reg. 14,361 (1989).

<sup>109</sup> Comp. Gen. Dec. B-236904 (18 Sept. 1989), 89-2 CPD ¶ 242.

<sup>110</sup> Comp. Gen. Dec. B-234380.2 (24 Aug. 1989), 89-2 CPD ¶ 173.

This rule should have application in the coming year if agencies terminate commercial activities studies and the functions are converted to the most efficient organization as required by the Conference Report on the DOD Appropriations Act, 1990.<sup>111</sup>

In *Energy Management Corporation*<sup>112</sup> GAO held that it would not overturn a contracting officer's nonresponsibility determination for a small business for an unsatisfactory record of integrity. The Small Business Administration had earlier declined to review the contracting officer's decision under the certificate of competency program. The GAO decided that it would review the contracting officer's decision, but then denied the protest anyway.

In two cases, *Esilux Corp.*<sup>113</sup> and *Palmetto Container Corp.*,<sup>114</sup> the GAO held that general allegations of wrongdoing are not enough to support a protest. A protest must include a detailed statement of its underlying factual and legal grounds. The latter case applied this standard to allegations of bad faith, which normally are sufficient to justify GAO review.

#### *Time Limits for Filing Protests*

In *Sterling Environmental Services, Inc.*<sup>115</sup> the protester filed a protest with the Navy and then waited for over three months before going to GAO. The GAO held that even if the protestor had not received notice of the Navy's denial of its protest before that time, the protester could wait only a reasonable time before going to the GAO. The GAO determined that three months was not reasonable.

GAO found a significant issue in *Reliable Trash Service Company of Maryland*.<sup>116</sup> The Comptroller General considered an untimely protest where there was a clear violation of law and the government did not award to the lowest cost offeror.

#### *Interested Parties*

In *Waste Conversion, Inc.*<sup>117</sup> a firm proposed for debarment is not an interested party because it would not be eligible for award, even if it prevailed on the protest.<sup>118</sup>

Subcontractors on non-ADPE contracts repeatedly try to pursue protests before the GAO. In *Michael L. Cook, Inc.*<sup>119</sup> GAO restated the well-established rule that a prime contractor's award of a subcontract is "by or for the government" when the prime contractor principally provides large-scale management services to the government and, as a result, generally has an ongoing purchasing responsibility. In *Computer Manufacturing Components, Inc.*<sup>120</sup> GAO distinguished between a subcontract awarded by the operator of a GOCO plant in support of a production contract and a subcontract awarded in support of a facilities contract to maintain the plant. The latter is "by or for the government" and may be protested, but the former is not and may not be protested. In *ToxCo, Inc.*<sup>121</sup> the protester alleged that the Environmental Protection Agency effectively directed the selection of the subcontractor. Assuming that was true, however, the GAO held that this alone was not enough to show that the prime contractor was acting "by or for the government."

#### *Remedies*

*H & H Environmental Services—Claim for Costs*<sup>122</sup> is an example of the existing rule that GAO will not award protest costs where agency action makes the protest academic.

#### *General Services Board of Contract Appeals*

##### *General*

The General Services Board of Contract Appeals (GSBCA) has another year of experience as a protest forum. The most significant change in the past year from the perspective of the GSBCA has been that Representative Jack Brooks (D-Tex.) left the House Government Operations Committee to assume leadership of the House Judiciary Committee. Representative Brooks's involvement in the area of Brooks Act bid protests has been an important factor in the evolution of the GSBCA as a protest forum.

##### *Interested Party*

The GSBCA has taken a view of subcontractor protests that is different from the GAO's. In *MCI Telecommunications Corp.*<sup>123</sup> the board stated in *dicta*

<sup>111</sup> H.R. Conf. Rep. No. 345, 101st Cong., 1st Sess. 27-28 (1989).

<sup>112</sup> Comp. Gen. Dec. B-234727 (12 July 1989), 89-2 CPD ¶ 38.

<sup>113</sup> Comp. Gen. Dec. B-234689 (8 June 1989), 89-1 CPD ¶ 538.

<sup>114</sup> Comp. Gen. Dec. B-237534 (5 Nov. 1989), 89-2 CPD ¶ \_\_\_\_.

<sup>115</sup> Comp. Gen. Dec. B-234798 (12 May 1989), 89-1 CPD ¶ 455.

<sup>116</sup> Comp. Gen. Dec. B-234367 (8 June 1989), 89-1 CPD ¶ 535.

<sup>117</sup> Comp. Gen. Dec. B-234761 (11 Apr. 1989), 89-1 CPD ¶ 371.

<sup>118</sup> FAR 9.406-3(c)(7).

<sup>119</sup> Comp. Gen. Dec. B-234940.2 (11 May 1989), 89-1 CPD ¶ 444.

<sup>120</sup> Comp. Gen. Dec. B-234781 (11 July 1989), 89-2 CPD ¶ 30.

<sup>121</sup> Comp. Gen. Dec. B-235562 (23 Aug. 1989), 89-2 CPD ¶ 170.

<sup>122</sup> Comp. Gen. Dec. B-235512.2 (31 May 1989), 89-1 CPD ¶ 524.

<sup>123</sup> GSBCA No. 9926-P, 89-2 BCA ¶ 21,650.

that its definition of "interested party" is broader than that of the GAO. In *3D Computer Corporation*<sup>124</sup> the GSBGA found jurisdiction over a subcontract protest. This was in spite of a previous holding from the U.S. District Court for the District of Columbia in *Amdahl Corporation v. Baldridge*<sup>125</sup> that the particular prime contract in question did not make the prime an agent of the United States.

The Court of Appeals for the Federal Circuit in *MCI Telecommunications Corp. v. United States*<sup>126</sup> has held that the GAO and GSBGA definitions of "interested party" are identical. The court observed that a protester must be an actual or prospective bidder and that a subcontractor like MCI simply did not meet this definition. The court rejected the argument that MCI's alleged intent to bid on a resolicitation made it an interested party. Presumably, the General Services Board of Contract Appeals will follow the Federal Circuit's reasoning in future cases and decline jurisdiction over subcontractor bid protests.

#### Time Limits

The GSBGA strictly enforces its business hours. In *Computer Dynamics, Inc.*<sup>127</sup> the GSBGA ruled that a protest was untimely because it was filed after hours on the last day by facsimile machine. The fact that it was logged in on that same day by a GSBGA clerk working late was immaterial.

#### Subject Matter Jurisdiction

In *National Biosystems, Inc.*<sup>128</sup> the board looked to the scope of work for a contract and determined that the use of ADPE, while not predominant, was significant, therefore making the contract subject to the Brooks Act. The board did say, however, that the ADPE portion of the work could have been broken out from the non-ADPE portion.

In *Mandex, Inc.*<sup>129</sup> the board held that a TEMPEST testing contract was not subject to the Brooks Act because, although the contractor's engineers had to understand radio frequency spectrum and phenomena, the contract could be fulfilled without significant use of ADPE.

The Court of Appeals for the Federal Circuit held in *United States v. Citizens and Southern National Bank*<sup>130</sup> that a procurement under the National Bank Act<sup>131</sup> is not an ADPE contract, despite the requirement for extensive use of ADPE. Instead, the acquisition was a delegation of depository authority to an agent.

#### Violations of Law or Regulation

*Vanguard Technologies Corp.*<sup>132</sup> notes that the Brooks Act limits the GSBGA to reviewing allegations that the government violated law or regulation.

In *C3, Inc.*<sup>133</sup> the board held that a Delegation of Procurement Authority (DPA) required the agency to comply with all laws, regulations, and policies regarding ADPE acquisitions. Failure to follow a nine-year-old DOD policy letter about the AUTODIN system was therefore a fatal flaw in the procurement.

In *Systemhouse Federal Systems, Inc.*<sup>134</sup> the board, in dicta, stated that a handbook on teleprocessing services was a regulation, even though the handbook specifically stated that it was not a regulation.

When an agency and a protester agree to settle a protest, the agency becomes vulnerable to a reverse protest. Specifically, an interested party adversely affected by the corrective action may challenge the settlement. In *Johnson Controls, Inc.*<sup>135</sup> the agency settled two protests by agreeing to a new round of best and final offers. Johnson Controls then successfully protested on the ground that the agency had violated no law or regulation. The settlement agreement from the earlier protests did not identify any violation. Furthermore, it implicitly stated that the alleged violations did not occur.

#### Warner Amendment, 10 U.S.C. § 2410, Decisions

The Court of Appeals for the Federal Circuit opined in *Cyberchron Corp. v. United States*<sup>136</sup> that the failure of an agency to make the DFARS-required determination that an acquisition is exempted by the Warner Amendment does not affect the validity of the exemption.

<sup>124</sup> GSBGA No. 9962-P, 89-2 BCA ¶ 21,826.

<sup>125</sup> 617 F. Supp. 501 (D.D.C. 1985).

<sup>126</sup> 878 F.2d 362 (Fed. Cir. 1989).

<sup>127</sup> GSBGA No. 10288-P, 1989 BPD ¶ 294.

<sup>128</sup> GSBGA No. 10332-P, 90-1 BCA ¶ \_\_\_\_ (7 Nov. 1989).

<sup>129</sup> GSBGA No. 9786-P, 89-3 BCA ¶ 21,914.

<sup>130</sup> No. 89-1361 (Fed. Cir. Nov. 14, 1989).

<sup>131</sup> 12 U.S.C. § 90.

<sup>132</sup> GSBGA No. 10217-P-R, 89-3 BCA ¶ 22,116.

<sup>133</sup> GSBGA No. 10066-P, 89-3 BCA ¶ 22,053.

<sup>134</sup> GSBGA No. 10227-P, 90-1 BCA ¶ \_\_\_\_ (27 Oct. 1989).

<sup>135</sup> GSBGA No. 10115-P, 89-3 BCA ¶ 22,172.

<sup>136</sup> 867 F.2d 1407 (Fed. Cir. 1989).

The GSBCA held in *Communications Technology Applications, Inc.*<sup>137</sup> that the Brooks Act covers flight training systems.

In *Electronic Systems Associates, Inc.*<sup>138</sup> the GSBCA held that because Strategic Defense Initiative (Star Wars) is a weapons system, research on computer technology that is or may be an integral part of the system is excluded from the Brooks Act.

#### *Remedies*

Suspensions of the Delegation of Procurement Authority. An agency should consider petitioning the GSBCA for a partial lifting of a suspension of its delegation of procurement authority when the agency can justify unusual and compelling circumstances. One example of such a circumstance is emergency maintenance requirements of existing equipment.<sup>139</sup> In *Data Switch Corp.*,<sup>140</sup> the GSBCA suspended the blanket DPA for a Navy contracting office as an enforcement mechanism. In practical terms, this meant that the contracting office could acquire no ADPE without the specific permission of GSA.

Sanctions. In *ViON Corporation*<sup>141</sup> the GSBCA dismissed a protest based upon ViON's failure to respond to reasonable discovery requests from the government. In *International Technology Corporation*<sup>142</sup> the board held that it would not award sanctions under Federal Rule of Civil Procedure 11 because its rules did not specifically impose those standards on attorneys. Nevertheless, the GSBCA did hold that it had inherent authority to impose attorneys' fees as a sanction for bad faith actions of parties appearing before it. Note that both *ViON Corporation* and *International Technology Corporation* were rulings on requests by the government for sanctions against a protester. Other boards of contract appeals have held that they have no jurisdiction to award attorneys' fees as sanctions against the government.<sup>143</sup>

Costs of Protest. In *Gallegos Research Group Corp.*<sup>144</sup> a protester recovered its costs for pursuing a protest where the agency did not promptly advise the

protestor/offeror that its proposal was technically unacceptable as required by FAR 15.609(c). The protestor alleged that it pursued a fruitless SBA size protest that it would not have done if it had known that its technical proposal was unacceptable.

Apportionment of Protest Costs. In *Digital Corporation*<sup>145</sup> the Air Force successfully argued that a protester that won on only one of several allegations should recover only those fees attributable to the meritorious allegation. Having no data showing the costs attributed to each allegation, the board looked at such factors as the percentage of discovery and hearing devoted to the meritorious allegation and awarded twenty percent of the billed costs.

Fees for Pro Se Protesters. In *InSyst Corp.*<sup>146</sup> the successful protester was a one-man corporation whose principal was an attorney. The GSBCA awarded attorneys' fees to the protester based upon the time its president had devoted to pursuing the protest. Interestingly, there was an allegation in this case that the protester was in business only for the purposes of filing protests against federal agencies. In *Severn Companies Inc.*<sup>147</sup> the protester recovered the costs of consulting with an attorney who did not represent the protester in the protest.

Reimbursement of the Judgement Fund. In *United States v. Julie Research Laboratories, Inc.*<sup>148</sup> the Court of Appeals for the Federal Circuit refused to hear an appeal challenging the board's authority to order an agency to reimburse the permanent indefinite judgement fund.<sup>149</sup> The CAFC held that the dispute was one between two federal agencies and there was therefore no case or controversy. Since this *Julie Research* decision the board has directed reimbursement in several cases as a tool to discourage "green-mail," the tendency to buy off protestors at no cost to agency appropriations.<sup>150</sup>

#### *The Courts*

##### *Claims Court Protests*

In *AT&T Technologies, Inc. v. United States*<sup>151</sup> the Claims Court held that a successful protester's recovery

<sup>137</sup> GSBCA No. 9978-P, 89-3 BCA ¶ 21,941.

<sup>138</sup> GSBCA No. 9966-P, 89-2 BCA ¶ 21,759.

<sup>139</sup> Electronics Systems Associates, Inc., GSBCA No. 10177-P, 89-3 BCA ¶ 22,161.

<sup>140</sup> GSBCA No. 10034-P-R, 89-3 BCA ¶ 22,137, *stayed*, 89-3 BCA ¶ 22,138.

<sup>141</sup> GSBCA No. 10218-P, 90-1 BCA ¶ 22,287.

<sup>142</sup> GSBCA No. 10056-C(10010-P), 90-1 BCA ¶ \_\_\_\_ (16 Oct. 1989).

<sup>143</sup> See, e.g., LTV Aerospace & Defense Company, ASBCA No. 37571, 89-3 BCA ¶ 22,249.

<sup>144</sup> GSBCA No. 9983-P, 89-3 BCA ¶ 21,907.

<sup>145</sup> GSBCA No. 9285-C(9131-P), 89-3 BCA ¶ 22,181.

<sup>146</sup> GSBCA No. 10143-C(10032-P), 90-1 BCA ¶ \_\_\_\_ (21 Nov. 1989).

<sup>147</sup> GSBCA No. 9425-C(9344-P), 89-3 BCA ¶ 21,915.

<sup>148</sup> 881 F.2d 1067 (Fed. Cir. 1989).

<sup>149</sup> See 31 U.S.C. § 1304.

<sup>150</sup> See, e.g., Bedford Computer Corp., GSBCA No. 9837-C(9742-P), 90-1 BCA ¶ \_\_\_\_ (13 Oct. 1989).

<sup>151</sup> 18 Cl. Ct. 315 (1989).

of proposal preparation costs was limited by the cost principles and the cost accounting standards (CAS). AT&T had filed a post-award claim for proposal preparation costs based upon the government's breach of an implied-in-fact contract to consider fairly and honestly AT&T's proposal. AT&T had claimed bid and proposal (B&P) costs, pre-contract costs, selling costs, attorneys' fees, and facilities capital cost of money. The protester alleged that the cost principles and the CAS did not apply to a breach of contract. The agency alleged that the cost principles and the CAS applied, that AT&T could recover only B&P costs, and that AT&T could not reclassify some B&P costs out of overhead. The court permitted the reclassification, but otherwise rejected AT&T's claim. This case is important because it rejects the theory that the cost principles do not apply to breach cases and holds that proposal preparation costs are a very narrow category of costs. It will be interesting to see if the GAO and the GSBGA adopt the holding in this case.

#### *Scanwell Suits in District Court*

*National Federation of Federal Employees v. Cheney*<sup>152</sup> addressed the standing of federal employees to protest a decision to contract out under OMB Circular A-76. The District of Columbia Circuit Court of Appeals emphasized that a plaintiff must demonstrate that its complaint is in the zone of interests to be protected or regulated by a statute or constitutional guarantee. The court then examined each statute regulating contracting out and determined that the complaint of NFFE was not within the zone of interests protected. Furthermore, because the union and its members never bid on the contract, they could not be disappointed bidders.

*CC Distributors, Inc., et al. v. United States*<sup>153</sup> held that an incumbent contractor has standing to protest an Air Force decision to convert a contracted out activity to an in-house operation. The contractor's interest in competing for the work was considered to be within the zone of interests of the same statute addressed in *National Federation of Federal Employees v. Cheney*.

#### *Review of GAO Protests*

GAO decisions are reviewed by a suit in federal district courts under the Administrative Procedure Act, 5 U.S.C. §§ 701-706. In *Shoals American Industries, Inc. v. United States*<sup>154</sup> the Eleventh Circuit held that considerable deference is accorded to General Account-

ing Office decisions. Under this standard of review, GAO will rarely be overturned.

GAO decisions may also be reviewed by a later protest to the Claims Court. In *Honeywell, Inc. v. United States*<sup>155</sup> the Court of Appeals for the Federal Circuit stated that the proper standard for review of a GAO decision is whether there was a rational basis for the decision. The CAFC therefore reversed the Claims Court decision, which had improperly reviewed the GAO decision *de novo*.

In *SWD Associates—Claim for Costs*<sup>156</sup> a successful protester lost its award of protest costs and proposal preparation costs. SWD had successfully protested a contract award to the GAO, but received its proposal preparation costs instead of the contract award.<sup>157</sup> SWD then sought to enjoin performance of the contract in district court. The agency won in district court by proving, contrary to the GAO decision, that it had made no errors in the procurement.<sup>158</sup> SWD then came back to the GAO and asked for the costs that GAO had previously awarded. The GAO modified its earlier decision in light of the district court's finding, and SWD ended up recovering nothing.

### **Fraud and Related Matters**

#### *Major Fraud Act Amendments of 1989*

##### *General*

The Major Fraud Act Amendments of 1989<sup>159</sup> amended certain sections of the Major Fraud Act of 1988,<sup>160</sup> which had created a new criminal offense of "procurement fraud." The amendments authorize the Attorney General to pay rewards of up to \$250,000 to persons who furnish information relating to a possible procurement fraud under the Act (the so-called "bounty hunter" provision). The rewards are to be paid from Department of Justice funds, but the Attorney General may petition the court for reimbursement of these funds from criminal fines imposed as a result of a conviction. The Attorney General's decision to pay a reward is discretionary, and a decision not to authorize such a reward is not subject to judicial review. Additionally, such payments are not authorized to individuals who: 1) are government employees who furnish information or render services in the performance of official duties; 2) unjustifiably fail to furnish the information to their employer before furnishing it to government law enforcement personnel; 3) participated in the offense; or 4)

<sup>152</sup> 883 F.2d 1038 (D.C. Cir. 1989).

<sup>153</sup> 883 F.2d 146 (D.C. Cir. 1989).

<sup>154</sup> 877 F.2d 883 (11th Cir. 1989).

<sup>155</sup> 870 F.2d 644 (Fed. Cir. 1989), *rev'g* 16 Cl. Ct. 173.

<sup>156</sup> Comp. Gen. Dec. B-226956.3 (1 Sept. 1989), 89-2 CPD ¶ 206.

<sup>157</sup> SWD Assoc., Comp. Gen. Dec. B-226956.2 (16 Sept. 1987), 87-2 CPD ¶ 256.

<sup>158</sup> SWD Associates Ltd. Partnership v. United States General Services Administration, No. 87-2719, 34 CCF (CCH) ¶ 75,468 (D.D.C. 31 Mar. 1988).

<sup>159</sup> Pub. L. No. 101-123, 103 Stat. 759 (1989).

<sup>160</sup> Pub. L. No. 100-700, 102 Stat. 4631 (1988).

furnish information that has been publicly disclosed, unless the individual is the original source of the information.

#### *Cap on Attorneys' Fees*

The amendments also amend the Major Fraud Act to eliminate the \$75 per hour cap on attorneys' fees for certain proceeding costs. The Act had contained conflicting provisions, one limiting attorney costs to 80 percent of the costs incurred and the other to \$75 per hour.

### *Whistleblower Protection Act of 1989*

#### *General*

On 10 April 1989, President Bush signed into law the Whistleblower Protection Act of 1989.<sup>161</sup> The main purpose of the Act is to strengthen the protection given to federal employees against personnel actions taken in retaliation for disclosures of violations of law, rule, or regulation, of gross mismanagement or waste of funds, or of a substantial and specific danger to public health or safety. Former President Reagan had vetoed similar legislation shortly before leaving office.<sup>162</sup> The Act established the Office of Special Counsel (OSC), formerly the Office of the Special Counsel of the Merit Systems Protection Board (MSPB), as an independent agency and enhanced the responsibilities and powers of the OSC and the MSPB with respect to the protection of whistleblowers. The Act allows government whistleblowers to take their cases to the MSPB. The OSC is authorized to receive and investigate complaints of prohibited personnel practices or other prohibited practices within the investigative authority of the Special Counsel, including complaints of political activities prohibited by 5 U.S.C. §§ 7321-7324. The Act also prohibits the Special Counsel from disclosing the identity of a whistleblower without his or her consent unless such disclosure is necessary because of an imminent danger to public health or safety or an imminent violation of criminal law. Furthermore, the Act only requires the whistleblower to show that his or her information disclosure was a *contributing factor* in an agency's reprisal and eliminates the requirement to show that the agency *intended* to retaliate for the disclosure. The Act limits the definition of whistleblowing by adding the requirement that the mismanagement or waste of funds be *gross* (rather than ordinary or normal?). The Act also eliminates the Special Counsel's right to seek review of MSPB decisions in court, although individuals may still

do so.<sup>163</sup> Military whistleblowers have similar protection.<sup>164</sup>

#### *Regulations*

The Office of Special Counsel recently issued interim regulations implementing the Act.<sup>165</sup> Except for certain sections, the interim regulations were effective on 14 November 1989.

#### *Procurement Integrity*

#### *Congress Changes, Then Suspends, Procurement Integrity Provisions*

In November 1989 House and Senate conferees concluded two months of negotiations over the FY 1990/1991 DOD Authorization Act.<sup>166</sup> One of the key issues during these negotiations was how to clear up some of the problems of interpretation of the original procurement integrity provisions passed last year as part of the Office of Federal Procurement Policy Act Amendments of 1988.<sup>167</sup> According to this statute, government-wide regulations were supposed to go into effect on 16 May 1989. In a hastily drafted provision, however, Congress delayed this implementation date to 16 July 1989 because of confusion and lack of training over the meaning of some of the key provisions.<sup>168</sup> At any rate, after including the results of the conferees' negotiations in section 814 of the DOD Authorization Act, Congress then suspended the procurement integrity provisions for one year, effective the day after the President signed into law the Government Ethics Reform Act of 1989.<sup>169</sup>

#### *Changes in the Authorization Act*

**General.** As passed and signed into law,<sup>170</sup> the FY 1990/1991 DOD Authorization Act changes the original procurement integrity provisions in five main areas. Furthermore, section 814(e) of the Authorization Act requires the Office of Federal Procurement Policy to issue regulations to implement these changes no later than 90 days after the enactment of the Act, which was on 29 November 1989.

**Procurement Official.** First, Congress attempted to clarify the definition of "procurement official." Section 814(b) of the FY 1990/1991 DOD Authorization Act provides a list of specific activities that an individual must "participate personally and substantially" in with respect to a particular procurement before he or she will

<sup>161</sup> Pub. L. No. 101-12, 103 Stat. 16 (1989).

<sup>162</sup> 51 Fed. Cont. Rep. (BNA) 730 (17 Apr. 1989).

<sup>163</sup> The Act became effective in July 1989 and is codified at 5 U.S.C. §§ 1201-1222, 2302, 3352, and 7701.

<sup>164</sup> 10 U.S.C. § 1034.

<sup>165</sup> 54 Fed. Reg. 47,341 (1989) (to be codified at 5 C.F.R. Chapter VIII, Parts 1800, 1810, 1820, 1830, and 1840).

<sup>166</sup> See H.R. Conf. Rep. No. 331, 101st Cong., 1st Sess. 150 (1989).

<sup>167</sup> Pub. L. No. 100-679, 102 Stat. 4055, amending 41 U.S.C. § 423 (1988).

<sup>168</sup> Pub. L. No. 101-28, 103 Stat. 57 (1989).

<sup>169</sup> Pub. L. No. 101-194, 103 Stat. 1716 (1989).

<sup>170</sup> Pub. L. No. 101-189, 103 Stat. 1352 (1989).

be deemed to be a procurement official. These activities are: 1) drafting a specification; 2) reviewing and approving a specification; 3) preparing or issuing a procurement solicitation; 4) evaluating bids or proposals; 5) selecting a source; 6) conducting negotiations; 7) reviewing and approving the award, modification, or extension of a contract; and 8) any other specific procurement action set forth in implementing regulations. While helpful, the list still leaves a great deal of room for interpretation. For example, what constitutes "conducting negotiations?" Mere presence in the room? Discussions only with other government officials to help formulate the government's negotiating position? Perhaps the implementing regulations will help clarify these terms.

**Recusal.** The second area of change concerns recusals of procurement officials so that they may discuss future employment with a competing contractor. The original provisions did not address recusals, so no procedure for a procurement official to obtain a recusal on a particular procurement existed. Section 814(a) of the FY 1990/1991 DOD Authorization Act now permits contacts by competing contractors with procurement officials for the limited purpose of determining whether the individual is interested in discussing employment or business opportunities. Once contacted, the procurement official must notify both his or her supervisor and the agency's ethics advisor. Additionally, the official must request recusal and receive approval of the request before engaging in any discussions. Once granted, the procurement official is disqualified from participating personally and substantially on any contract with the contractor. Agencies are also required to develop specific criteria for review of recusal requests, including the timing of the request and the degree of the individual's involvement in key procurement decisions. Finally, no recusal is permitted during the period beginning with the issuance of the solicitation and ending with the award of a contract.

**"Knowing Standard."** A third change in section 814(a) of the Authorization Act concerned the adoption of a "knowing" standard for violations of the provisions' post-employment restrictions. Under the original provisions, a procurement official could unknowingly or unintentionally violate these restrictions and end up being subject to a civil fine of up to \$100,000.

**Subcontractors.** The fourth change in section 814(a) of the FY 1990/1991 DOD Authorization Act added coverage for post-employment with subcontractors. Subsection 6(n) of the Office of Federal Procurement Policy Act Amendments of 1988 defined "competing contractor" as "any entity that is, or is reasonably likely to become, a contractor for or recipient of a contract or subcontract . . . ." This definition was interpreted very broadly to include every subcontract, even those so small that a problem with procurement integrity could not be imagined. Therefore, Congress narrowed the instances in which the post-employment restrictions of the procurement integrity provisions would apply. Specifically, a

procurement official who participates personally and substantially in a prime contract is now prohibited from working for a subcontractor if any of the following apply: 1) the subcontract is a first or second tier subcontract with a price over \$100,000; 2) the subcontractor "significantly assisted" in the negotiation of the prime contract; 3) the procurement official personally directed or recommended the subcontractor as a source on the prime contract; or 4) the procurement official personally reviewed and approved the award of the subcontract.

**Ethics Official.** The last change in section 814(a) of the FY 1990/1991 DOD Authorization Act requires agencies to designate an "ethics official," whose responsibilities will include reviewing requests for, and issuing opinions on, whether an individual may work for a particular contractor or subcontractor. These opinions must be issued within thirty days after receiving both the request and all relevant information reasonably available to the requestor. The Justice Department is expected to enter into a Memorandum of Understanding that it will not penalize individuals who reasonably rely upon a written opinion after a complete disclosure.<sup>171</sup>

#### *Suspension of the Procurement Integrity Provisions*

**Congressional Action.** On 17 November 1989, shortly after the Conference Committee agreed to the above changes, Congress agreed to suspend the application of these changes and the original procurement integrity provisions for a period of one year. Section 507 of the Government Ethics Reform Act of 1989<sup>172</sup> also suspended the application of 10 U.S.C. § 2397a, which required reports of certain contacts between contractors and government officials who had participated in the performance of a procurement function in connection with contracts awarded to that contractor, and 10 U.S.C. § 2397b, which barred certain Department of Defense officials who had spent more than half of the previous two years working with a specific contractor from accepting employment from that contractor. These suspensions were a result of a compromise between the President, who wanted the provisions repealed because of the perceived difficulty in attracting and retaining qualified personnel due to the post-employment restrictions, and the Senate, which was seeking to avoid a total repeal of the provisions that the House of Representatives had passed a day earlier.<sup>173</sup> Agreeing to the suspension may have saved Congress from a Presidential veto of their pay raise, which was included in the Government Ethics Reform Act of 1989, but it created a strange situation with respect to the applicability of the provisions. The effective date of the suspension was 1 December 1989, the day after the President signed the bill into law, and not 16 July 1989, the day the procurement integrity provisions took effect. Therefore, the provisions theoretically apply between July 16 and the date of the suspension, a roughly four and one-half month period. Such an anomalous result can only be

<sup>171</sup> 52 Fed. Cont. Rep. (BNA) 747 (6 Nov. 1989).

<sup>172</sup> Pub. L. No. 101-194, 103 Stat. 1716 (1989).

<sup>173</sup> 52 Fed. Cont. Rep. (BNA) 951 (27 Nov. 1989).

explained by Congress's desire to ensure that the President did not get the suspension unless Congress got its pay raise.

**Regulatory Implementation.** FAC 84-54 was issued on 8 December 1989 to suspend the regulatory implementation of the procurement integrity provisions in FAC 84-47.<sup>174</sup> The suspension is retroactive to 1 December 1989 and will remain in effect until 30 November 1990. Solicitations issued prior to 1 December that have not had bids opened or offers received will be amended, wherever practicable, to delete the procurement integrity provisions and clauses, while those which have had bids opened or offers received prior to 1 December but have not yet had an award made will have those provisions ignored and deleted by an administrative change.<sup>175</sup>

#### ***DOD Ethics Council***

DOD Directive 5120.47 establishes a new ethics council which is to develop a model ethics program for DOD personnel to enhance awareness and understanding of ethical issues and to facilitate the enforcement of ethical standards.<sup>176</sup> The directive provides for a four-member council consisting of the Under Secretary of Defense (Acquisition) as Chairman and the three Service Secretaries. The DOD General Counsel and the DOD Inspector General are to serve as special advisors to the Council.<sup>177</sup>

#### ***Coordination of Procurement Fraud Remedies***

On 7 June 1989, DOD revised its directive concerning the coordination of remedies in procurement fraud cases.<sup>178</sup> The directive requires each component to monitor all *significant* fraud and corruption cases. Among other things, the monetary threshold for a "significant case" was increased from \$50,000 to \$100,000. The revisions also state that all investigations into defective products or product substitution in which a serious hazard to health, safety, or operational readiness is indicated are to be considered significant cases, regardless of the dollar value. Furthermore, agencies are required to identify and document any adverse impact on a DOD mission. The revised directive provides the following examples of adverse impact: 1) endangerment to personnel or property; 2) monetary loss; 3) denigration of program or personnel integrity; 4) compromise of the procurement process; and 5) reduction or loss of mission readiness. Adverse impact information is to be used in the development of remedies plans and victim impact statements. The new directive also requires cer-

tain actions in significant product substitution cases, such as an assessment of the adverse impact of the fraud, preparation of comprehensive victim impact statements, and issuance of safety alerts. Funding for testing of defective products for criminal investigations is the responsibility of the affected procurement organization. Finally, the revised directive states that, when appropriate, contractual and administrative actions shall be taken before resolution of the criminal or civil case.

#### ***Debarment and Suspension***

##### ***Reciprocal Debarment and Suspension for Contractors and Grantees***

Executive Order No. 12,689 requires reciprocal government-wide debarment and suspension for contractors and grantees. Under the new executive order, a firm that has been debarred or suspended from participating in government *procurement* activities will also be debarred or suspended from participating in government *nonprocurement* activities.<sup>179</sup> The term "nonprocurement activities" is defined as all programs and activities involving federal financial and non-financial assistance and benefits. Agencies are allowed to grant exceptions to permit a debarred or suspended party to participate in procurement or nonprocurement activities to the extent provided in applicable regulations. The Office of Management and Budget is to assist federal agencies in resolving differences between the provisions contained in the FAR and in regulations issued pursuant to Executive Order 12,549, which mandated government-wide debarment and suspension in nonprocurement programs.<sup>180</sup> Proposed regulations implementing the executive order are to be published within six months of the resolution of differences.

##### ***Changes to Suspension and Debarment Regulations***

FAC 84-46 made some revisions to the debarment and suspension procedures. Among other things, the revisions render contractors ineligible for contract awards government-wide upon issuance of a notice of proposed debarment.<sup>181</sup> Contractors must also make compelling reason determinations before entering into any subcontract more than or equal to \$25,000 with a subcontractor that has been debarred, suspended, or proposed for debarment.<sup>182</sup> The revisions also impose a new certification requirement on contractors. Contractors must certify that: 1) they are not presently debarred, suspended, proposed for debarment, or declared ineligible for award; 2) they have not, within a three-year period

<sup>174</sup> Federal Acquisition Circular 84-47, 11 May 1989 [hereinafter FAC].

<sup>175</sup> FAC 84-54, 8 December 1989.

<sup>176</sup> Dep't of Defense Directive 5120.47, Establishing the DOD Ethics Council (Sept. 5, 1989).

<sup>177</sup> See 52 Fed. Cont. Rep. (BNA) 454 (11 Sept. 1989).

<sup>178</sup> Dep't of Defense Directive 7050.5, Coordination of Remedies for Fraud and Corruption Related to Procurement Activities (June 7, 1989).

<sup>179</sup> Exec. Order No. 12,689, 54 Fed. Reg. 34,131 (1989).

<sup>180</sup> Exec. Order No. 12,549, 51 Fed. Reg. 6370 (1986).

<sup>181</sup> FAR 9.405.

<sup>182</sup> FAR 9.405-2.

preceding the offer, been convicted of or had a civil judgment rendered against them for a specified list of offenses; 3) they are not presently indicted for, or otherwise criminally or civilly charged by a governmental entity with, the commission of any of the specified offenses; and 4) they have not, within a three-year period preceding the offer, had one or more contracts terminated for default by a federal entity.<sup>183</sup>

#### *Scope of GAO Review of Suspension and Debarment Action*

In *Far West Meats*<sup>184</sup> GAO held that it was not the proper forum to consider the weight or sufficiency of evidence for the purpose of a debarment decision or to consider whether the agency acted properly in proposing one firm for debarment and not another. The protestor contended that the proposed debarment action was based upon isolated incidents of tendering nonconforming meat products which the firm corrected. The protester also argued that the government was legally precluded from proposing the protester for debarment unless it also proposed to debar many of its competitors. The GAO stated that the scope of its review of alleged improper suspensions and debarments is restricted to a consideration of whether the agency has shown a reasonable basis for its action and whether the agency followed the proper procedures. Applying this standard, GAO held that the agency action was proper.

#### *Transfer of Owner's Interest Not Sufficient to Avoid Debarment*

In *Robinson v. Cheney*<sup>185</sup> the court upheld the debarment of the contractor because the transfer of the owner's interest to a third party under a trust agreement was not enough to establish the contractor's present responsibility. After the government notified him that it was considering debarring him and his company, the owner executed an irrevocable trust agreement, transferring all of his interests in the company's assets. The debarring official decided that without some explanation of the circumstances surrounding the alleged bribing and bid rigging conduct (the owner did not submit any statement denying the allegations), he could not evaluate the efficacy of the trust in ensuring that such conduct was not likely to reoccur. The court found that this determination was not arbitrary, capricious, or an abuse of discretion. Furthermore, the court noted that the trust agreement did not contain any specific term prohibiting the owner from either acting on behalf of the company or participating in its management. Finally, the court stated that neither the trust nor any material submitted by the company gave any assurance that the owner would not conduct illegal activities on behalf of the firm

outside company channels. Noting that the imputation of the conduct of the owner to the company was not in issue, the court held that the debarment of the company was proper.

#### *Restitution Not a Mitigating Factor in Debarment Determination*

In *Irene G. Herran*<sup>186</sup> the board held that restitution as part of a plea agreement to criminal charges is not evidence of present responsibility and does not minimize the seriousness of the illegal conduct. The board stated that restitution is an equitable remedy designed to prevent the unjust enrichment of the undeserving party. Therefore, the board concluded that restitution should carry little weight in debarment proceedings, which are directed primarily towards protecting the public interest. After reviewing the facts, the board held that the three-year debarment was necessary and appropriate.

#### *Actions to Protect the Integrity of the System*

##### *Appearance of Unfair Advantage Justifies Corrective Action*

In *Holmes and Narver Services*<sup>187</sup> the Comptroller General held that, despite the good faith efforts of the parties, the likelihood that the awardee had an unfair competitive advantage justified corrective action to protect the integrity of the competitive process. The decision focused upon one of three former officials of the requiring activity who the awardee hired to work on its proposal. During his government service, this individual had access to the acquisition plan, which included the independent government estimate and the source selection plan. The GAO found this information to be procurement sensitive information, especially in light of the agency's refusal to release such information to the protestors. Despite the absence of specific evidence, the GAO concluded that it was likely that this individual had used the restricted information to which he had access to shape his judgments. The GAO therefore determined that the best way to eliminate the awardee's likely unfair competitive advantage and preserve the integrity of the competitive process was to reopen negotiations with those offerors within the competitive range, to release to each the restricted information, and to request new Best and Final Offers.

##### *Conduct Which Compromises Integrity of System Justifies Termination of the Contract*

In *The Department of the Air Force—Request for Reconsideration*<sup>188</sup> the GAO held that conduct which compromises the integrity of the competitive process is

<sup>183</sup> FAC 84-46, 8 May 1989.

<sup>184</sup> Comp. Gen. Dec. B-234642.2, B-234690 (9 June 1989), 89-1 CPD ¶ 547.

<sup>185</sup> 876 F.2d 152 (D.C. Cir. 1989).

<sup>186</sup> HUD BCA No. 88-3448-D57, 90-1 BCA ¶ \_\_\_\_\_ (5 May 1989).

<sup>187</sup> Comp. Gen. Dec. B-235906, B-235906.2 (26 Oct. 1989), 89-2 CPD ¶ 379.

<sup>188</sup> Comp. Gen. Dec. B-234060.2 (12 Sept. 1989), 89-2 CPD ¶ 228; Litton Systems, Inc., Comp. Gen. Dec. B-234060 (12 May 1989), 89-1 CPD ¶ 450 (original decision).

sufficient to sustain the termination of a contract. The GAO found that the awardee had obtained source selection sensitive information concerning its competitor's product. The Air Force contended that no corrective action was necessary because the protestor failed to show that the awardee had obtained a competitive advantage. The GAO stated that the propriety of an award decision should not turn solely upon whether or not improperly obtained information ultimately benefited the wrongdoer. The propriety of the award decision must also be judged by whether the integrity of the competitive process is served by allowing the award to remain undisturbed. On this basis, the GAO concluded that the integrity of the competitive process would be best served by terminating the contract and resoliciting. The GAO further stated that the potential harm to the public confidence in the procurement system if the award was to stand outweighed the projected delay and increased costs (ranging from \$60 to \$300 million) of the resolicitation.

*Contracts Tainted By Actual or Apparent Conflicts of Interest May Be Disaffirmed*

In *United Telephone Company of the Northwest*<sup>189</sup> the GSBCA held that a contracting officer's responsibility to safeguard the interests of the government<sup>190</sup> is sufficient authority for procurement officials and a contractor who is acting as the government's procuring agent to disaffirm contracts tainted by actual or apparent conflicts of interest. A supervisory employee of the agency who was primarily responsible for reviewing and ensuring that the procurement and award documents met the government's requirements was also employed by a subcontractor of the awardee. The board found that, as the subcontractor's representative, the employee's communications with the awardee prevented the awardee from making a mistake in its bid. Additionally, the board found that the employee's understanding of the government's requirements resulted from his responsibilities towards the government. The board concluded that the employee's actions constituted a conflict of interest under 42 U.S.C. § 7215(a)(1), which resulted in a lack of full and open competition. The board, citing *United States v. Mississippi Valley Generating Company*,<sup>191</sup> held that violations of the civil statutes and regulations governing conflicts of interest and competition in procurements provide sufficient authority to disaffirm contracts tainted by such violations. Accordingly, the GSBCA granted the protest and directed the government to make the award to the protestor.

*Injunctive Relief for Conflict of Interest*

In *TRW Environmental Safety Systems, Inc. v. United States*<sup>192</sup> the Claims Court, without requiring any proof

of prejudice, held that a violation of a conflict of interest statute is a basis for injunctive relief in a bid protest. The protestor contended that the Chairman of the Department of Energy's Source Selection Board violated a federal conflict of interest statute<sup>193</sup> by participating in the instant procurement during the prohibitive period while his former employer was then involved in related department proceedings. The court held that the Chairman's former employer was substantially, directly, and materially involved in the proceedings because 1) it was a prospective bidder during the time in question, both as a subcontractor to the apparent winner and as a prime contractor; and 2) it also stood to benefit from the award of the contract because of its current support contracts. Accordingly, the court found a violation of the conflict of interest statute. The court then concluded that a contract tainted by a violation of a conflict of interest statute, which exists for the purpose of protecting the integrity of the procurement process, may be disaffirmed without any showing of prejudice. The court ordered that the instant contract be awarded to the protestor.

*Evaluation of Offers May Cure Appearance of Unfair Advantage*

In *International Resources Group, Ltd.*<sup>194</sup> GAO held that the agency properly evaluated an offeror's proposal in a manner which negated the appearance of an unfair competitive advantage. The offeror had proposed as its team leader a retiring federal employee who held a senior position within the agency. The agency's general counsel's office opined that the federal employee's senior position created the opportunity for preferential treatment and that this opportunity alone created a conflict of interest. It therefore advised the agency to consider the offeror nonresponsible if it continued to propose the federal employee as its team leader. Based upon the general counsel's advice, the agency evaluated the offeror's proposal on the basis of an alternate team leader. The GAO held that the agency's action in this case was sufficient corrective action to negate the apparent unfair competitive advantage. It also concluded that the exclusion of the offeror from the competition was not warranted in this case.

*Defective Pricing*

*Late or Additional Data*

In a memorandum dated 7 June 1989 DOD issued guidance on steps to be taken when contractors are late in submitting certificates of cost or pricing data and when additional data is submitted with the certificate. Despite the requirement in FAR 15.804-4(a) that a certificate be signed and submitted as close as practicable

<sup>189</sup> GSBCA No. 10031-P, 89-3 BCA ¶ 22,108.

<sup>190</sup> See FAR 1.602-2.

<sup>191</sup> 364 U.S. 520 (1963) (government may disaffirm contracts tainted by conflicts of interest prohibited by criminal statutes).

<sup>192</sup> 18 Cl. Ct. 33 (1989).

<sup>193</sup> 42 U.S.C. § 7216.

<sup>194</sup> Comp. Gen. Dec. B-234629.2 (31 Aug. 1989), 89-2 CPD ¶ 196.

to the date when the agreement on price is reached, the memorandum states that some contractors are submitting their certificates well in excess of thirty days after the date of price agreement. Although the memorandum urges that corrective measures be taken to cure this defect, no guidance is provided on what actions should be taken. The memorandum outlines three steps that contracting officers should take when additional data is submitted with a certificate. First, a statement summarizing the impact of the additional data should be obtained from the contractor. Second, the price should be reduced if the data indicates that the negotiated price was increased by any significant amount, although the price should not be adjusted upward. Offsets should be considered in accordance with FAR 15.804-7(b)(4), (b)(5), and (b)(6) (the understated data must have been available, but not submitted, prior to price agreement). Finally, the price negotiation memorandum should include a list of such data and identify the extent to which this data was relied upon to establish a fair and reasonable price.<sup>195</sup>

#### *G&A Rates*

In *Texas Instruments*<sup>196</sup> the government argued that the contractor's disclosure of an error in its G&A rate should have been made to the procuring contracting officer (PCO) for it to be effective. The board noted, however, that the PCO was not involved in negotiating the G&A rate. Instead, it merely accepted the rate agreed upon by the administrative contracting officer (ACO) and the contractor. Accordingly, the board held that by making the disclosure to the official directly involved in negotiating the G&A rate, the disclosure was made to an appropriate official.

#### *Pre negotiation Position Already Reflected Reduced Costs*

*Unisys Corporation v. United States*<sup>197</sup> concerned an appeal of a case we reported on last year, *Sperry Corporation Systems, Defense Systems Division*.<sup>198</sup> The Court of Appeals for the Federal Circuit, affirming the board's decision, held that the price reduction for defective data was the difference between the figures upon which the government relied and the amount not disclosed by the contractor. Rather than using the figures that the contractor had disclosed, the board used the figures in the memorandum attached to the government's prenegotiation clearance because those were the figures upon which the government relied. The contractor had argued that the comparison figures should be the difference between the figures that the contractor disclosed and those that it did not disclose. In rejecting the

contractor's position, the court stated that the board's comparison figures were the most accurate basis for determining the amount by which the nondisclosure injured the government.

#### *Revised Computer-Generated Reports*

In *Boeing Company*<sup>199</sup> the board held that the contractor's failure to provide revised computer-generated reports reflecting changes caused by newly submitted cost data did not constitute the submission of defective cost or pricing data. The contractor disclosed new "discrete rates," which were used to calculate "summary WRAP (wrap-around) rates." A revised WRAP rate report did not accompany the contractor's disclosure. Summary WRAP rates were calculated using a computer model. Although noting that the revised calculations could have been generated in a matter of hours, the board concluded that the disclosure of the one-page list of discrete rates was sufficient. The board found that the government had already made adjustments in the wrap rates that the contractor used in its proposal and that it knew that the new discrete rates were in line with those that the government had already factored into the government's best and final proposal. Under these circumstances, the board held that the government was aware of the significance of the new data and that it was in possession of the facts necessary to place it in a position equal to the contractor in making judgments on pricing.

#### *Adequate Price Competition*

DAC 88-6 provided additional guidance on what constitutes adequate price competition for purposes of an exemption from or waiver of the submission of certified cost or pricing data. DFARS 215.804-3 provides, *inter alia*, that when there is a reasonable expectation that adequate price competition will result, there is rarely a need for the submission or certification of cost or pricing data, regardless of the type of contract. Adequate price competition may exist even for cost-reimbursement contracts provided that price is a substantial factor in the source selection criteria. If after the receipt of proposals it is determined that adequate price competition does not in fact exist, then cost or pricing data should be obtained and certified. DFARS 215.804-3 also provides guidance on what constitutes adequate price competition in dual source programs. DFARS 215.805-70 provides, however, that even when adequate price competition exists, a cost realism analysis may be appropriate to ensure that the proposed costs are consistent with the technical proposal and that the contractor understands the scope of the work.<sup>200</sup>

<sup>195</sup> See 46 Fed. Cont. Rep. (BNA) 47 (7 Nov. 1989) for a copy of the memorandum.

<sup>196</sup> ASBCA No. 30836, 89-1 BCA ¶ 21,489.

<sup>197</sup> 888 F.2d 841 (Fed. Cir 1989).

<sup>198</sup> ASBCA No. 29525, 88-3 BCA ¶ 20,975.

<sup>199</sup> ASBCA No. 32753, 90-1 BCA ¶ 22,270, *mot. for recon. denied*, 90-1 BCA ¶ \_\_\_\_ (25 Oct. 1989).

<sup>200</sup> DAC 88-6, 21 April 1989.

### Significant Fraud Cases

#### *Conviction for False Statement of Affiliation Does Not Invalidate the Contract*

In *Consolidated Marketing Network, Inc.*<sup>201</sup> the board decided that the small business contractor's criminal conviction for falsely certifying that it had no parent company did not void the contract. In response to the contracting officer's inquiry, the contractor had falsely stated that it had no parent company. The contractor made this misrepresentation after the Small Business Administration had found the contractor eligible for award. The contractor had made no misrepresentations to the SBA, however. The SBA considered the contractor and its affiliations and found the contractor to be a small business. The board stated that to void a contract on equitable grounds, the government must show that the contractor's misrepresentation substantially contributed to the government's decision to award it the contract and that the government justifiably relied upon that misrepresentation in making the award. The board held that the government had failed to show actual inducement or justifiable reliance because it was required by regulation to follow the SBA's determination.

#### *Project Manager's Fraud Imputed to Contractor*

In *Michael C. Avino, Inc.*<sup>202</sup> the board held that a project manager's fraudulent conduct could be imputed to the contractor to sustain a default termination. After the contractor's project manager was convicted of willfully using false concrete strength reports (the project manager had altered the test reports to reflect what he believed to be the concrete's actual strength), the government terminated the contract for default on the grounds that the contractor had submitted false test reports. Citing *Joseph Morton Co., Inc. v. United States*<sup>203</sup> the board stated that if the project manager's conduct could be imputed to the contractor, the submission of false reports would be a breach of contract justifying the default termination. Noting that the contractor had expressly advised the government that its project manager had full authority to act on all contract matters, the board concluded that the project manager acted within his apparent authority when he submitted the test results. Accordingly, the board held that the project manager's conduct could be imputed to the contractor.

#### *Revocation of Acceptance*

The government was entitled to revoke its acceptance of equipment on which a subcontractor had placed counterfeit National Sanitation Foundation and Underwriters' Laboratories labels. Although not culpable in the fraud, the contractor in *D&H Construction Co.*<sup>204</sup>

was responsible for its subcontractor's actions and was required to replace the equipment at no cost to the government. The fraud existed at the time of acceptance and could not have been discovered by the exercise of reasonable care. In initially accepting the equipment, the government had a right to rely upon the labels as proof that the equipment conformed to the contract's specifications.

#### *Losing Bidder May Pursue Damage for Lost Profits Based on Fraud by Successful Bidder*

In *Service Engineering Company v. Southwest Maine, Inc.*<sup>205</sup> the court concluded that the losing bidders on a small business set-aside were entitled to proceed with a claim for lost profits based upon fraud by the successful bidder. The losing bidders alleged that the successful bidder falsely certified to the government and the Small Business Administration (SBA) that it was a small business by manipulating its method of counting employees to remain within the small business size limitation. It periodically fired and rehired employees to stay below the required average number of employees. The court denied the bidders' summary judgment motion, however, because it could not as a matter of law determine which plaintiff would have received the award because of the factors other than cost that were used in making the award.

#### *Government Employees May Bring Qui Tam Actions*

A district court concluded in *Erickson ex rel. United States v. American Institute of Biological Sciences*<sup>206</sup> that government employees may bring *qui tam* suits under 31 U.S.C. § 3730 against contractors. The court noted that the statute does not directly address whether government employees may maintain *qui tam* suits, but it excludes only four groups. The first exclusion bars suits brought by members of the Armed Forces. The second exclusion bars *qui tam* actions against members of Congress, members of the judiciary, and senior members of the Executive Branch. The court stated that these exclusions demonstrate that Congress did not intend a blanket exclusion against suits by government employees. The court found that none of the four exclusions barred the suit. The suit was dismissed, however, because the government employee did not comply with certain filing requirements.

#### *Qui Tam Action Justifies Restrictions on Contractor's Activities*

In *United States ex rel. Taxpayers Against Fraud v. Singer Company*<sup>207</sup> the Fourth Circuit held that a *qui tam* defendant who is liquidating assets to pay off acquisition costs incurred as the target of a leveraged

<sup>201</sup> ASBCA No. 37740, 89-3 BCA ¶ 22,000.

<sup>202</sup> ASBCA No. 31752, 89-3 BCA ¶ 22,156.

<sup>203</sup> 3 Cl. Ct. 120, *aff'd*, 757 F.2d 1273 (Fed. Cir. 1985).

<sup>204</sup> ASBCA No. 37482, 89-3 BCA ¶ 22,070.

<sup>205</sup> No. C-86-6096 SAW (N.D. Cal. Aug. 8, 1989), 52 Fed. Cont. Rep. (BNA) 608 (2 Oct. 1989).

<sup>206</sup> 716 F. Supp. 908 (E.D. Va. 1989).

<sup>207</sup> 889 F.2d 1327 (4th Cir. 1989).

buyout can be required to obtain prior court approval of any transactions that could impair the government's ability to collect damages. The preliminary injunction did not prevent the contractor from conducting routine business operations. Rather, it merely required prior court approval of any asset sales, divestitures, major stock buybacks, or other extraordinary corporate transactions. The government asked for the injunction after taking over the *qui tam* action. The amount of the government's claim is \$77 million.

#### *False Claims Act Civil Penalties May Violate Double Jeopardy*

In *United States v. Halper*<sup>208</sup> the Supreme Court held that the government's attempt to impose civil False Claim Act penalties under 31 U.S.C. § 3729 after obtaining criminal convictions may violate the Constitution's double jeopardy clause. The defendant had been convicted of 65 counts of violating the criminal False Claims Act<sup>209</sup> and was sentenced to a two-year prison term and fined \$5,000. One year later, the government filed suit to recover \$2,000 for each of the 65 false claims (\$130,000). The Supreme Court decided that a defendant who has been previously punished in a criminal proceeding may not be subjected to additional civil sanctions to the extent that those sanctions serve as punishment, rather than towards remedial goals. The Court concluded that civil sanctions must be rationally related to an amount calculated to compensate the government for the costs of the corruption. The trial judge had reduced the civil fine from \$130,000 to \$16,000 plus the government's costs of investigating and prosecuting the case. The Court remanded the case to the trial judge to permit the government to demonstrate that the judge's assessment of damages for the costs of the corruption was erroneous.

#### **Potpourri**

##### *Fiscal Law*

##### *Leases Crossing Fiscal Years*

The rules for obligating funds for leases extending into two fiscal years have been changed in the Army.<sup>210</sup> The old obligation rules for leases distinguished between those with a termination clause (that is, a clause allowing the government to terminate the lease upon giving a certain number of days of advance notice) and those with no termination clause. The complex gyrations involved in obligating and deobligating for the termination period near the end of the fiscal year have been eliminated. The new rule, applicable to both kinds of

leases, provides authority to obligate funds current when the lease is signed up to the full amount of the lease or up to the end of the period of availability of the appropriation, whichever is less. There is a problem with this change, however, because it did not take into consideration the statutory authority to use, for admittedly severable leases crossing fiscal years, funds current when the lease was signed to fund the entire lease.<sup>211</sup> AR 37-1 Policy Message No. 89-14 took care of this problem by changing Table 12-2, AR 37-1, Army Accounting and Fund Control, to include this statutory authority.<sup>212</sup> Curiously, however, when AR 37-1 was republished a few days later on 1 October 1989, Table 12-2 made no mention of this statutory authority. Because the Army probably intends to take advantage of this statutory authority in appropriate situations, it would be helpful if the Finance and Accounting Center would clear up this inadvertently caused confusion by reissuing its September 1989 message.

##### *Funding of Replacement Contracts*

In a ruling late in 1988, the Comptroller General modified the rule on the availability of deobligated funds from a contract terminated for convenience to fund a replacement contract. In *Matter of Replacement Contracts*<sup>213</sup> the Comptroller General held that funds obligated in one fiscal year for a contract that is later terminated for convenience by a court order or by other competent authority because the contract award was improper remain available in a later fiscal year to fund a replacement contract. Four conditions must be met, however: 1) the original award must have been made in good faith; 2) the agency must have a continuing *bona fide* need for the goods or services involved; 3) the replacement contract must be of the same size and scope as the original contract; and 4) the replacement contract must be executed without undue delay. This change makes the funding of replacement contracts in termination for convenience situations consistent with those in termination for default situations. It does not, however, address the availability of these funds for replacement contracts when the original contract is terminated for convenience on other legitimate grounds not involving a court or other order.<sup>214</sup>

##### *Defense Management Review*

##### *General*

One of the most significant developments in 1989 in the management of the DOD procurement system was the Secretary of Defense's study of the system and his sweeping recommendations to improve its quality and

<sup>208</sup> 109 S. Ct. 1892 (1989).

<sup>209</sup> 18 U.S.C. § 287.

<sup>210</sup> Message, HQ, U.S. Army Finance and Accounting Cen., DASA-FM, 242109Z Jan 89, subject: Fund Control Policy Modification, AR 37-1.

<sup>211</sup> See 10 U.S.C. § 2410a(2).

<sup>212</sup> Message, HQ, U.S. Army Finance and Accounting Cen., DASA-FM, 202110Z Sep. 89.

<sup>213</sup> Ms. Comp. Gen. B-232616 (19 Dec. 1988).

<sup>214</sup> For a complete discussion of the modified rule, see Contract Law Note, *Funding of Replacement Contracts*, The Army Lawyer, June 1989, at 56; *Funding of Replacement Contracts Following Termination*, The Nash & Cibinic Report, Vol. 3, No. 4, ¶ 33 (April 1989).

efficiency. Made public on 11 July 1989, the Defense Management Review was a response to President Bush's call on DOD to improve defense acquisition and management.<sup>215</sup> Most of its recommendations are not new, but instead have their genesis in the 1986 report from the President's Blue Ribbon Commission on Defense Management (the Packard Commission). Furthermore, few of the recommendations will impact directly upon procurement law because they are aimed primarily at more efficient management of the DOD procurement system. Examples of these recommendations include: 1) establishing a Program Manager/Program Executive Officer chain of command that is separate from the buying commands for both funding and reporting of major programs; 2) increasing program stability by baselining, more multiyear contracting, and longer tenures for successful acquisition personnel; 3) reducing internal regulations and reporting requirements; 4) enhancing the quality of the acquisition work force by more training, advanced degree education and schooling, and an alternative personnel system; 5) adopting efficiency improvements by eliminating management layers and certain research and development activities and by consolidating other activities, such as consolidating contract administration functions into one big Defense Contract Management Agency; and 6) improving system development through more early prototyping and increased use of commercial products.

#### *Effects of the Defense Management Review*

Nevertheless, procurement attorneys can expect to be working in a much different environment if and when these recommendations are implemented. For example, many regulatory changes are expected in the near future, such as the elimination or consolidation of vast portions of the DFARS and service FAR supplements, after a special task force completes its "zero-based review." Also, the Defense Management Review itself in effect withdrew the proposed rule that would have mandated contractor codes of conduct.<sup>216</sup> It also established a requirement for Under Secretary of Defense for Acquisition approval of any fixed-price type research and redevelopment contracts in excess of \$25 million.

#### *Proposed Legislation*

Finally, some proposed legislation is expected in the following areas: 1) a reduction or elimination of the ten percent threshold of savings over annual contracts that proposed multiyear contracts must show to get congressional approval; 2) an alternative personnel and pay system for civilian acquisition employees; 3) expanded education and training opportunities for civilian employ-

ees; 4) simplified competitive procedures in the purchase of commercial products; and 5) authority to award contracts on initial proposals without discussions on a basis other than price alone (GAO currently prohibits "best value" type awards without discussions).<sup>217</sup>

#### *Authority*

##### *Authority to Guarantee Payments to a Supplier*

In *H. Landau & Co. v. United States*<sup>218</sup> a supplier to an 8(a) government contractor brought an implied-in-fact contract action seeking to have the government honor representations made by two Small Business Administration (SBA) officials to the supplier. The officials guaranteed that payment for raw materials provided by the supplier to the contractor would be made, notwithstanding the contractor's unfavorable financial situation. The Claims Court granted the government's motion for summary judgment on the basis that the SBA officials lacked the express authority to guarantee payment to the contractor. The Claims Court held that, while the officials were empowered to countersign checks drawn on the special account, this could not be done absent prior written approval of the contracting officer. Absent the contracting officer's prior written approval, the officials were held not to have any authority to bind the government. The contractor appealed, and the Court of Appeals for the Federal Circuit reversed and remanded the case for further consideration on the issue of the extent of the SBA officials' authority to guarantee payment to the supplier.<sup>219</sup> The Court of Appeals required the Claims Court to determine whether the SBA officials had "implied actual authority" to assure the supplier that it would be paid for supplying the materials. Crucial to the appellate court were the undisputed facts that the SBA officials had the duty to ensure that the 8(a) contractor acquired the necessary raw materials to fulfill its contractual obligations. That duty, when coupled with the authority to draw checks on the joint account (albeit limited by having to obtain prior written approval by the contracting officer), may have carried with it the implicit authority to guarantee payment to the suppliers.<sup>220</sup>

##### *No Authority to Enter Into an Implied-in-Fact Contract*

*United States v. Amdahl*<sup>221</sup> held, *inter alia*, that an implied-in-fact contract may be found to exist even though the contract is unenforceable or illegal, where disallowance of recovery would violate the court's "good conscience to impose on the contractor all economic loss from having entered into an illegal contract." In *Chavez v. United States*<sup>222</sup> the Claims Court refused to extend

<sup>215</sup> For a complete copy of the 31-page report, see 52 Fed. Cont. Rep. (BNA) 124 (10 July 1989).

<sup>216</sup> See 53 Fed. Reg. 52,744 (1988).

<sup>217</sup> See, e.g., *Mariah Associates, Inc.*, Comp. Gen. Dec. B-231710 (17 Oct. 1988), 88-2 CPD ¶ 357.

<sup>218</sup> 16 Cl. Ct. 35 (1989).

<sup>219</sup> *H. Landau & Co. v. United States*, 886 F.2d 322 (Fed. Cir. 1989).

<sup>220</sup> *Id.* at 324.

<sup>221</sup> 786 F.2d 387 (Fed. Cir. 1986).

<sup>222</sup> 8 FPD ¶ 143 (Cl. Ct. 1989).

the Federal Circuit's reasoning in *Amdahl* to a case where the plaintiff failed to establish the elements of an implied-in-fact contract. In *Chavez* the plaintiff claimed that the government, acting through its Department of Agriculture officials, entered into an oral contract to repair and replace a portion of an irrigation pipeline. The plaintiff claimed that the repairs were made for the benefit of subordinate entities of the Agriculture Department and that certain department employees had agreed to pay for the work. After finding that the evidence failed to establish that an oral contract had been formed, the court addressed the issue of whether an implied-in-fact contract existed, because the plaintiff had conferred a benefit on the government. The court held that no implied-in-fact contract had been formed because conferring a benefit on the government does not create a contractual relationship. Significant to the court's holding was the absence of authority to contract on the part of the government officials. The court affirmatively stated that implied-in-fact contracts must be based upon conduct of authorized employees.

#### *Settlement Agreement*

In *Craftsman Industrial Maintenance*<sup>223</sup> the contractor filed a claim seeking additional compensation after executing a settlement agreement and being paid by the government. The contractor contended that the settlement agreement did not constitute a bar to the claim because the individual executing the agreement on the contractor's behalf lacked the authority to do so. The board refused to grant the government's motion to dismiss, which the board characterized as one for summary judgment, and held that there existed an issue of material fact as to whether the agent had authority to execute the settlement agreement on the contractor's behalf.

#### *Competition*

In *W.B. Jolley*<sup>224</sup> the protester challenged as being unduly restrictive a solicitation provision requiring a cost proposal to be submitted on a computer floppy disk. The protestor alleged that only those offerors possessing existing computer capabilities could meet this solicitation requirement. The Army demonstrated that the requirement reflected its needs because it would reduce the time and errors made in preparing and evaluating cost proposals and unit price extensions for the consolidated services RFP, which contained 500 line items. GAO found that this requirement did not significantly restrict competition because the Army agreed to furnish at no cost pre-formatted and programmed disks that permitted contractors merely to type in their prices for each of the 500 items.

### *Small and Small Disadvantaged Business Programs*

#### *Competition in 8(a) Contracting*

Section 303(b) of the Business Opportunity Development Reform Act of 1988<sup>225</sup> requires that acquisitions pursuant to section 8(a) of the Small Business Act,<sup>226</sup> be awarded on a competitive basis restricted to eligible program participants if: 1) there is a reasonable expectation that at least two participants will submit offers and the award can be made at a fair market price; and 2) the anticipated award price of the contract (including options) will exceed \$5,000,000 for manufacturing contracts or \$3,000,000 (including options) for all other contracts. Section 303(d) of the Business Opportunity Development Reform Act amended the appeal authority of the Small Business Administration to permit appeals as to whether a requirement should be offered to the 8(a) program and as to whether the agency has determined correctly the fair market price of the acquisition. FAC 84-52 amended FAR 5.202 and 5.205 by adding requirements to synopsize section 8(a) competitive acquisitions contemplated by the Business Opportunity Development Reform Act of 1988. In addition to the usual information, the synopsis must also include information: 1) advising that the acquisition is being offered for competition limited to eligible 8(a) concerns; 2) specifying the Standard Industrial Classification (SIC) code; 3) advising that eligibility to participate may be restricted to firms in either the developmental or transitional stage; and 4) encouraging interested 8(a) firms to request a copy of the solicitation expeditiously because the solicitation will be issued without further notice once the SBA accepts the action for the section 8(a) program. The requirements were effective on 30 November 1989.<sup>227</sup>

#### *Contracting with Small Disadvantaged Business Concerns and the Evaluation Preference*

DAC 88-11 amended the DFARS to implement further section 1207 of Pub. L. No. 99-661, section 806 of Pub. L. No. 100-180, and section 844 of Pub. L. No. 100-456. The DFARS now provide that Historically Black Colleges and Universities (HBCU's) and Minority Institutions (MI's) must be given the same evaluation preference in unrestricted procurements as that accorded to small disadvantaged business (SDB) concerns. The evaluation preference provisions have also been amended to provide that the preference will not be applied to procurements over the dollar threshold for the Trade Agreements Act<sup>228</sup> when the low offeror is offering an eligible end product or where the application would otherwise violate an agreement or memorandum of understanding with a foreign government. Finally, the DFARS has been revised concerning SDB regular dealers

<sup>223</sup> ASBCA No. 35707, 90-1 BCA ¶ 22,261.

<sup>224</sup> Comp. Gen. Dec. B-234490 (26 May 1989), 89-1 CPD ¶ 512.

<sup>225</sup> Pub. L. No. 100-656, 102 Stat. 3853 (1988).

<sup>226</sup> 15 U.S.C. §§ 631-650.

<sup>227</sup> FAC 84-52, 31 October 1989.

<sup>228</sup> 19 U.S.C. §§ 2501-2582.

and their qualification for the SDB evaluation preference. To qualify for the evaluation preference in an unrestricted procurement, an SDB regular dealer must provide the product of an SDB concern, if available. To qualify for preferential consideration in a partial small business set-aside, an SDB dealer or manufacturer must provide the product of an SDB concern, if available. In an unrestricted procurement or a partial set-aside, if the product of an SDB concern is not available, the dealer must provide the product of a small business to get the evaluation preference or the preferential treatment.<sup>229</sup>

#### *Liquidated Damages for Failure to Meet Small Business Subcontracting Goals*

Section 304 of the Business Opportunity Development Reform Act of 1988 requires a prime contractor to pay liquidated damages upon a finding of lack of good faith effort to achieve its small business subcontracting goals. "Failure to make a good faith effort to comply with the subcontracting plan" means willful or intentional failure to perform in accordance with the requirements of the subcontracting plan or willful or intentional action to frustrate the plan. The Act specifically requires that the contractor be afforded an opportunity to demonstrate a good faith effort regarding compliance prior to the contracting officer's final decision (which was expressly made subject to the Contract Disputes Act) to impose liquidated damages.

FAC 84-50 contains the interim regulations which implement the statutory requirements. Effective on 15 August 1989, the interim regulations provide that subcontracting goals should be set at a level that the parties reasonably expect can result from the offeror's expending good faith efforts to use small and small disadvantaged subcontractors to the maximum practicable extent. Contracting officers are advised to pay particular attention to the identification of steps that, if taken, would be considered to be a good faith effort. The amount of liquidated damages attributable to the contractor's failure to comply can be quite high: they must equal the actual dollar amount by which the contractor fails to meet each subcontract goal or, in the case of a commercial products plan, they must equal that portion of the dollar amount allocable to government contracts by which the contractor failed to meet each subcontract goal.

#### *Award Fee for Exceeding SDB, HBCU, and MI Subcontracting Goals*

On the other hand, DAC 88-8 has added a provision at DFARS 219.708(c)(2) that allows the use of an award fee provision in lieu of the incentive provision in DFARS 252.219-7009, Incentive Program for Subcontracting with Small and Small Disadvantaged Business Concerns,

Historically Black Colleges and Universities, and Minority Institutions, to motivate and reward a contractor for exceeding established SDB, HBCU, and MI subcontracting goals. This provision applies to negotiated procurements of \$10 million or more.<sup>230</sup>

#### *Final Policy Directive Implementing Title VII of the Business Opportunity Development Reform Act of 1988—Small Business Competitiveness Demonstration Program*

The Office of Federal Procurement Policy (OFPP) and the SBA have issued a final policy directive and test plan that implements Title VII of the Business Opportunity Development Reform Act of 1988. Title VII established the Small Business Competitiveness Demonstration Program. The program's purposes are to: 1) determine whether small businesses in certain industry groups can compete successfully on an unrestricted basis for government contracts; and 2) determine whether targeted goals and management techniques can expand government contract opportunities for small businesses in industry categories, where such opportunities historically have been low despite adequate numbers of small businesses in the economy. The program will be conducted over a four-year period, from 1 January 1989 through 31 December 1992. The program consists of two major components: 1) four designated industry groups (construction, refuse services, architectural and engineering (A&E) services, and non-nuclear ship repair), which test unrestricted competition; and 2) ten targeted industry categories (determined by each participating agency, in conjunction with the SBA), which test enhanced small business participation through continued use of set-aside procedures, increased management attention, and specifically tailored acquisition procedures, as implemented through agency procedures. The following agencies are participants in the program: Department of Agriculture; Department of Defense (except the Defense Mapping Agency); Department of Energy; Department of Health and Human Services; Department of Transportation; Environmental Protection Agency; General Services Administration; National Aeronautics and Space Administration; Department of Veterans' Affairs; and the Department of the Interior.<sup>231</sup> DAC 88-10 contains the Department of Defense implementation of the Small Business Competitiveness Demonstration Program.<sup>232</sup>

#### *Minority Small Business and Capital Ownership Development Program - Final Rule*

The SBA has amended its regulations concerning the Minority Small Business and Capital Ownership Development Program. Most of the revisions implement changes required by the Business Opportunity Development Reform Act of 1988.<sup>233</sup> Among the changes are: 1)

<sup>229</sup> Defense Acquisition Circular 88-11, 28 July 1989 [hereinafter DAC].

<sup>230</sup> DAC 88-8, 12 June 1989.

<sup>231</sup> 54 Fed. Reg. 37,741 (1989).

<sup>232</sup> DAC 88-10, 20 July 1989.

<sup>233</sup> Pub. L. No. 100-656; Business Opportunity Development Reform Act Technical Corrections Act, Pub. L. No. 101-37; 54 Fed. Reg. 34,692 (1989).

the 8(a) program term mandated by 7(j) of the Small Business Act, as amended by Pub. L. No. 100-656, is now a fixed nine-year term; 2) an individual with a net worth of less than \$250,000 will be regarded as economically disadvantaged for purposes of 8(a) program entry, and an individual with a net worth of less than \$750,000 will be regarded as economically disadvantaged for participation in programs, other than the 8(a) program, which require the SBA to make a determination for eligibility; and 3) the SBA has added two new threshold personal net worth figures for determining continuing economic disadvantage for individuals claiming disadvantaged status for 8(a) program participation.

#### *Changes to Operational Procedures of SBA's Office of Hearings and Appeals*

The SBA has issued a final rule implementing changes to the procedures of the SBA Office of Hearings and Appeals (OHA) required by the Business Opportunity Development Reform Act of 1988 and its implementing regulations.<sup>234</sup> Among the changes, the regulations were amended to clarify that OHA has jurisdiction over several types of proceedings relating to the 8(a) program, including program suspension, program termination, program graduation, denials of program admission for certain appealable grounds, and waiver of the requirement that each 8(a) contract be performed by the concern to which it was originally awarded.

#### *Small Business Tripartite Agreements*

Before FAC 84-51 was published, the section 8(a) small disadvantaged business program required the execution of two separate contracts, one between the procuring agency and the SBA and a second between the small disadvantaged business contractor (the 8(a) subcontractor) and the SBA. Except in procurements where the SBA will make advance payments to its 8(a) subcontractor, the contracting officer may now, as an alternative to executing two contracts, use a single contract document to be signed by the agency, the SBA, and its 8(a) subcontractor.<sup>235</sup> FAC 84-52 corrected the FAR citation from FAR 19.809 to FAR 19.811.<sup>236</sup>

#### *Qualifying for Small Business Set-Asides: the Demise of Size Appeal of Louisiana Filling, Inc.*

In *Size Appeal of Louisiana Filling, Inc.*<sup>237</sup> the SBA Office of Hearings and Appeals ruled that under the SBA's size regulations as written, large businesses could qualify as eligible to submit offers and receive awards of small business set-aside acquisitions for supplies as nonmanufacturers, provided that they supply the prod-

uct of a small business manufacturer or producer. The SBA had argued that the decision was contrary to the letter and spirit of the Small Business Act.<sup>238</sup> The SBA reacted to this decision by revising its regulations defining small business as it concerns nonmanufacturers. A "nonmanufacturer" is a company offering to supply but not manufacture the item being procured. The revision makes explicit the requirement that nonmanufacturer offerors on small business set-asides must be small businesses, and it establishes a size standard of 500 employees for such nonmanufacturers. The revision was effective on 31 March 1989.<sup>239</sup>

#### *SBA Establishes a Residual Size Standard*

The SBA established a residual size standard of \$3.5 million in average annual receipts for 52 industries that previously had no size standard. The industries include: 1) eight four-digit SIC industries within SIC E (transportation, communications, electric, gas, and sanitary services); 2) 43 four-digit industries within SIC Division H (finance, insurance, and real estate); and 3) SIC code 9999, Nonclassifiable Establishments (the only industry in SIC Division K). Effective on 25 December 1989, the residual size standard eliminates the need for separate rulemaking for these industries as requests arise.<sup>240</sup>

#### *Procedural Rules for Size Standards Program*

The procedural rules concerning the SBA's size determination program are now in final form except for sections 121.403 and 121.1202(a), which define "business concern or concern" for the purpose of SBA programs. These two sections have been issued as interim final rules.<sup>241</sup> The final rules are intended to improve the conceptual framework of size standards by reorganizing the current rules to obtain a more logical progression, by clarifying existing ambiguities, by conforming these rules to present SBA policies and precedents, and by providing some minor substantive modifications. The interim final rule at section 121.403 restates the existing definition of "business concern or concern" without containing a 51% United States ownership requirement. This is a change from the proposed rule. The definition requires a "business concern" to be organized for profit, to have a place of business located in the United States, and to make a significant contribution to the U.S. economy through payment of taxes or the use of American products, materials, or labor. Section 121.1202(a) adopts the definition of "concern" that the SBA has used for the Small Business Innovation Research Program since 1983, which includes a 51% U.S. ownership requirement.

<sup>234</sup> 54 Fed. Reg. 34,746 (1989).

<sup>235</sup> FAC 84-51, 21 August 1989.

<sup>236</sup> FAC 84-52, 31 October 1989.

<sup>237</sup> Appeal No. 2796 (December 14, 1987).

<sup>238</sup> 15 U.S.C. §§ 631-650 (1982). See McCann, Norsworthy, Ackley, Aguirre, Mellies, and Munns, *Recent Developments in Contract Law-1988 in Review*, *The Army Lawyer*, Feb. 1989, at 5, 32.

<sup>239</sup> 54 Fed. Reg. 13,160 (1989).

<sup>240</sup> 54 Fed. Reg. 47,968 (1989).

<sup>241</sup> 54 Fed. Reg. 52,634 (1989).

*Contract Options and Small Business  
Subcontracting Plans*

FAC 84-49 amended the FAR by adding a provision that requires that the cumulative value of the basic contract and all options be considered in determining whether a subcontracting plan is necessary.<sup>242</sup>

*Small Business Cases*

*Bid Responsiveness in a Small Business Set-Aside*

Bid responsiveness concerns whether a bidder has unequivocally offered to provide supplies in conformity with all material terms and conditions of a solicitation. Only where a bidder provides information with its bid that reduces, limits, or modifies a solicitation requirement may the bid be rejected as nonresponsive.<sup>243</sup>

With regard to a bidder's failure to complete the small business size status portion of the representation, a bidder's failure to certify under a small business set-aside that it is a small business does not affect the bid's responsiveness. Information as to a bidder's size is not required to determine whether a bid meets the solicitation's material requirements.<sup>244</sup> In contrast, in *J-MAR Metal Fabricating Co.*<sup>245</sup> the GAO held that a bidder's failure to complete the end item certification (i.e., the bidder left it blank) *does* require rejection of a bid as nonresponsive, because to be responsive a bid on a total small business set-aside must establish a bidder's obligation to furnish only end items manufactured or produced by a small business.

Recently the GAO has changed its position regarding its holding in *J-MAR Metal*. In *Concorde Battery Corporation*<sup>246</sup> the GAO held that a bidder's failure to certify that it will furnish only end items manufactured or produced by small business concerns does *not* require rejection of the bid as nonresponsive where the bidder would still be obligated to furnish only small business end items. In *Concorde* and in *J-MAR Metal* the solicitation incorporated FAR 52.219-6, Notice of Total Small Business Set-Aside (Apr. 1984), which provides that the bidder "agrees to furnish" only small business end items in its performance of the contract. The GAO held in *Concorde* that, although the bidder failed to complete the certifications contained in solicitation clause FAR 52.219-1, Small Business Concern Representation (May 1986), the bidder *would* be obligated to provide supplies produced by small business concerns because it did not take exception to any of the solicita-

tion terms, including those contained in FAR 52.219-6. Accordingly, its bid was responsive. In the *J-MAR Metal* case the GAO did not address the "agreement" contained in FAR 52.219-6, although the facts clearly indicate that the clause was in the solicitation.

In *Aircraft Components Inc.*<sup>247</sup> the Army failed to include FAR 52.219-6 in the solicitation. The protester's bid was rejected as nonresponsive because the protester had certified that not all end items would be manufactured by small business concerns. The protester argued that the solicitation did not require all end items to be manufactured by small business concerns because FAR 52.219-6 was omitted from the solicitation. But both the synopsis of the procurement published in the CBD and the front page of the solicitation had informed bidders that the procurement was being conducted as a total small business set-aside. The GAO therefore denied the protest, ruling that the FAR clause that was omitted from the solicitation merely advised bidders of requirements that are independently imposed on small business set-asides by the regulations of the SBA at 13 C.F.R. § 121.5(b)(2). The GAO further stated that because the regulations are published in the Federal Register and the Code of Federal Regulations, bidders are on constructive notice of their requirements, which are applicable whether or not the corresponding FAR clause is included in the solicitation.

When looking at the *Concorde* case and the *Aircraft Components Inc.* case, it appears that GAO's next logical step is to hold that a bid on a small business set-aside that fails to certify (i.e., the certification is left blank) that all end items will be manufactured by a small business may be ruled responsive even if FAR 52.219-6 is omitted from the solicitation. It is also interesting to note that in the *Concorde* case the GAO distinguished its ruling in *Delta Concepts, Inc.*,<sup>248</sup> where it held that the place of performance clause could not be used to cure a bidder's failure to certify that all end items would be manufactured or produced by a small business. *Delta* is silent on whether the solicitation contained the required clause FAR 52.219-6, a 1984 clause. If that clause was in the *Delta* solicitation, then that case cannot really be distinguished from *Concorde*.

*Determining Whether Joint Ventures and Teaming  
Agreement Contractors Qualify as Small Disadvantaged  
Businesses—Who Decides and How?*

In *Washington-Structural Venture*<sup>249</sup> WSV, a joint venture, protested the award of a total SDB set-aside, contending that it qualified as the low SDB bidder and

<sup>242</sup> FAC 84-49, 11 July 1989.

<sup>243</sup> TJAGSA Practice Note, *Concorde Battery Corp.*, The Army Lawyer, Sept. 1989, at 39 (citing *Ibex Ltd.*, Comp. Gen. Dec. B-230218 (11 Mar. 1988), 88-1 CPD ¶ 257).

<sup>244</sup> *Insinger Machine Co.*, Comp. Gen. Dec. B-234622 (15 Mar. 1989), 89-1 CPD ¶ 277.

<sup>245</sup> Comp. Gen. Dec. B-217224 (21 Mar. 1985), 85-1 CPD ¶ 329.

<sup>246</sup> Comp. Gen. Dec. B-235119 (30 Jun. 1989), 89-2 CPD ¶ 17.

<sup>247</sup> Comp. Gen. Dec. B-235204 (2 Aug. 1989), 89-2 CPD ¶ 98.

<sup>248</sup> Comp. Gen. Dec. B-230632 (13 July 1988), 88-22 CPD ¶ 43.

<sup>249</sup> Comp. Gen. Dec. B-235270 (11 Aug. 1989), 89-2 CPD ¶ 130.

that the awarded contractor (Abrantes) did not qualify as an SDB because of Abrantes' teaming agreement with a subcontractor. WSV first argued that it was entitled to the contract because it certified in its bid that it was an SDB and that only the SBA can determine that it is not an SDB. WSV argued that because the SBA declined to make that determination and the U.S. Army Corps of Engineers did not appeal the SBA's decision not to make the determination, WSV's self-certification as an SDB must be controlling. The GAO disagreed, noting that, although both DOD's SDB preference regulations and SBA regulations provide for referral of SDB status questions to the SBA for resolution, there was some question concerning the extent of the SBA's role when a joint venture is involved. The GAO held that where the SBA decides not to make a determination and leaves the matter in the hands of DOD, there was nothing improper with the Corps's deciding whether the joint venture was eligible for an SDB set-aside award. Interestingly, under the Business Opportunity Development Reform Act of 1988, sections 201(E) and (F)(vii), one responsibility of a new SBA division is to decide protests regarding SDB status for purposes of programs such as DOD's SDB set-aside and preference program. This law, however, was effective on 15 August 1989 and was not in effect at the time the SBA declined to make a determination of SDB status in this case. Although implementation of the Business Opportunity Development Reform Act provisions may moot the issue of who can decide whether a bidder is an SDB, this case is important for the fairly extensive analysis that the Corps did in deciding the status of the joint venture. The SBA may very well follow the Corps' reasoning in deciding future cases.

#### *Small Business Responsibility Determinations—Refer or Not to Refer?*

In *Falcon Associates, Inc.*<sup>250</sup> the contracting officer determined that the individual sureties on Falcon's bid bond were unacceptable and rejected its bid. Falcon argued that the contracting officer's determination must be referred to the SBA for review under the certificate of competency (COC) program. The GAO held that

an evaluation of surety responsibility is based exclusively on the qualifications of the surety rather than the bidder, and there is no indication that Congress intended to bring surety qualifications under the scrutiny of SBA through the Small Business Act. Accordingly, when the determination that a bidder is nonresponsible is based solely on the unacceptability of its sureties, the determination need not be referred to SBA.

#### *Constitutional Challenges at GAO*

In *Seyforth Roofing Co., Inc.*<sup>251</sup> the protester argued that, although it did not qualify as an SDB, its bid should have been considered because the SDB set-aside provision in the solicitation was unconstitutional. The

GAO dismissed the protest and stated, "[i]n the absence of clear judicial precedent, we decline to consider Seyforth's challenge to the IFB on constitutional grounds; the issue is a matter for the courts, not our Office, to decide." Additionally, GAO essentially ruled the protest untimely because Seyforth should have protested the terms of the IFB prior to bid opening.

#### *No Requirement That Contracting Agency Request SBA Reconsideration of a Nonresponsibility Determination*

Marlow Services, Inc. protested the Army's failure to refer its affirmation of its initial nonresponsibility determination regarding Marlow to the SBA for a second certificate of competency (COC) review.<sup>252</sup> After Marlow became the apparent low bidder, the contracting officer found Marlow nonresponsible based upon: 1) a negative pre-award survey, which indicated that Marlow did not have the financial resources and experience to perform the required services; and 2) the contracting officer's own assessment that Marlow's bid, which was considerably lower than the government's estimate, evidenced a lack of understanding of the contract's requirements. The SBA declined to issue a COC because Marlow failed to demonstrate that it had the financial resources necessary for contract performance. Marlow subsequently attempted to show the Army new evidence (a \$250,000 bank loan) to prove that it had the necessary financial resources, but the contracting officer refused to change the nonresponsibility determination. The contracting officer stated that the determination was not based solely upon financial capacity, but was also because of Marlow's poor performance history and failure to understand the contract requirements. Marlow contended in its protest that the contracting officer's scope of reconsideration review should have been limited to its financial resources, claiming that the SBA, by declining to issue the COC on financial grounds only, implicitly overruled the Army on the other grounds relating to the firm's capacity. The SBA stated in response to this that, although it may consider all areas of responsibility during a COC review, there is no statute, regulation, or informal procedure that requires it to consider additional grounds for referral after it has already decided to deny the COC on one ground. The SBA further stated that even though the letter denying the COC cites only one of the grounds for referral, there is no basis for concluding that the SBA reached a favorable result on any of the other grounds. The GAO concluded that because the record showed that the SBA's decision was based upon Marlow's financial capability, the contention that the SBA overruled the Army on the other two grounds was without merit. Marlow also argued that the Army was required to refer the reconsideration to the SBA. The GAO ruled that where the contracting agency has reassessed the bidder's responsibility in light of new information and has determined that the information either was substantially the same as previously considered or, if not previously considered, did not materially alter the initial nonrespon-

<sup>250</sup> Comp. Gen. Dec. B-236420 (18 Aug. 1989), 89-2 CPD ¶ 154.

<sup>251</sup> Comp. Gen. Dec. B-235703 (19 June 1989), 89-1 CPD ¶ 574.

<sup>252</sup> Marlow Services, Inc., Comp. Gen. Dec. B-229990.3 (19 Apr. 1989), 89-1 CPD ¶ 388.

sibility determination and accordingly did not warrant reversal of the initial determination, the contracting agency is not legally required to refer the matter to the SBA for a second COC review.

*Duty to Reconsider Small Business Nonresponsibility Determination—Bidder Responsible for Providing New Information to Agency, Not SBA*

The FAR provides that if the SBA has declined to issue a COC and no new information causes the contracting officer to determine a concern to be actually responsible, the contracting officer is required to proceed with award to the next lower bidder.<sup>253</sup> In *McGhee Construction, Inc.*<sup>254</sup> the GAO stated in *dicta* that even if the SBA had advised the contracting officer that the SBA had received the bidder's letter of commitment (i.e., new information concerning the bidder's financial responsibility), it was undisputed that the bidder did not send to the Navy the actual evidence of the financing until after the award. The GAO further stated that it was the bidder, not the SBA, who had the responsibility to notify the Navy of the bidder's new information and to provide the supporting documentation regarding its responsibility. A bidder has the duty to establish clearly and in a timely manner that it has the capability to perform, and an agency is not required to delay an award indefinitely until a bidder cures the causes of its nonresponsibility.

*Buy American Act Cases*

*Post-Award Failure to Waive the Buy American Act Requirements Was an Abuse of Discretion*

In *John C. Grimberg Co., Inc. v. United States*<sup>255</sup> the Court of Appeals for the Federal Circuit reversed and remanded the decision of the ASBCA that affirmed the contracting officer's denial of an equitable adjustment claim. The court determined that the Navy erred as a matter of law by failing to apply the criteria for determining unreasonable price differentials under the Buy American Act (BAA)<sup>256</sup> and thereby abused its discretion by not granting an equitable adjustment. In March 1984 the Navy awarded a fixed price construction contract to Grimberg. The contract included fabrication and installation of exterior precast concrete wall panels. Prior to bidding, Grimberg received a quotation from a domestic subcontractor for the precast panel work. After award, Grimberg failed to consummate a subcontract with the domestic concern and instead subcontracted with a Canadian firm for \$120,000 for fabrication and

\$117,000 for erection and other miscellaneous work. Subsequently, the Navy refused Grimberg's request for a waiver of the Buy American Act, and Grimberg contracted with another domestic subcontractor for \$200,000 for fabrication, \$59,000 for erection, and \$23,000 for miscellaneous work. Grimberg submitted an equitable adjustment claim for \$53,847. The BAA requires that only domestic materials be used for public works acquisitions unless the head of an agency determines that such use is inconsistent with the public interest or the cost is unreasonable.<sup>257</sup> The Executive Order that implements the BAA provides that, to determine if the cost of domestic materials are unreasonable, the agency shall apply given price differentials to the foreign materials for evaluation purposes. The Executive Order further states that the head of an agency may apply a greater differential, if reasonable.<sup>258</sup> The court held that if the agency head does not choose to apply a greater price differential, then the established price differentials become mandatory. The court also stated that, in post-award situations, an exception to the BAA is granted under the contract's changes clause only where warranted by the circumstances. If all existing BAA criteria are met, the decision to grant a change is discretionary. The court ruled, however, that the Navy abused this discretion because if it had granted the waiver, no increase in cost would have been incurred and the Navy may have been entitled to a credit. The dissent stated that post-award exemptions are only granted in very limited circumstances, such as where it was impossible for the contractor to request a pre-award exemption or where the material was unavailable domestically. In the dissent's opinion, neither of these circumstances nor any other circumstances requiring a waiver existed.

*Dollar Threshold for Applying the Trade Agreements Act*

The Trade Agreements Act of 1979<sup>259</sup> and its implementing regulations<sup>260</sup> prohibit federal agencies from purchasing certain products that originate in non-designated foreign countries if the item's total price exceeds a dollar threshold established by the United States Trade Representative. In *Tic-La-Dex Business Systems, Inc.*<sup>261</sup> the GAO made it clear that whether the threshold has been met is determined by the government's *estimated* value of the acquisition. The GAO held that the value of the acquisition is the total estimated dollar value of all orders to be placed during the contract period (i.e., the estimated value of the government's requirements) and not the potential value of an

<sup>253</sup> FAR 19.602-4(a) and (c).

<sup>254</sup> Comp. Gen. Dec. B-233763.2 (4 Apr. 1989), 89-1 CPD ¶ 352.

<sup>255</sup> 869 F.2d 1475 (Fed. Cir. 1989).

<sup>256</sup> 41 U.S.C. § 10a-d.

<sup>257</sup> 41 U.S.C. § 10d.

<sup>258</sup> Exec. Order No. 10,582, 3 C.F.R. 230 (1954-58), reprinted in 41 U.S.C. app. § 10d app. at 1042.

<sup>259</sup> 19 U.S.C. §§ 2501-2582.

<sup>260</sup> FAR subpart 25.4.

<sup>261</sup> Comp. Gen. Dec. B-235016.2 (6 Oct. 1989), 89-2 CPD ¶ 323.

individual offeror's contract. The GAO also ruled that a foreign product that is substantially transformed into a different item in the United States does not become a designated country end product exempt from application of the Trade Agreements Act.

### ***Labor Standards***

#### ***Service Contract Act***

**General.** FAC 84-46 amended the FAR to incorporate policies and procedures necessary to implement the Service Contract Act (SCA) of 1965,<sup>262</sup> portions of the Fair Labor Standards Act of 1938,<sup>263</sup> and related Secretary of Labor regulations and instructions. The new FAR subpart 22.10 and the eight new clauses in 52.222 give detailed instructions to contracting officers on implementing statutes and Department of Labor regulations that prescribe labor standards requirements for contracts to furnish services in the United States through the use of service employees.<sup>264</sup> DAC 88-10 issued revisions to DFARS 222.10 to supplement the new FAR coverage.<sup>265</sup> Highlights of these new Service Contract Act regulations follow.

**Applicability.** FAR 22.1003-6 sets forth rules for determining the applicability of the Walsh-Healey Public Contracts Act,<sup>266</sup> rather than the SCA, to contracts involving the remanufacturing of equipment, as distinguished from repair of equipment. Contracting officers are to refer questions concerning applicability of the SCA to the agency's labor advisor. Unresolved questions are to be submitted to the agency's labor advisor in writing through appropriate channels for submission to the Administrator, Wage and Hour Division, Department of Labor (DOL), for a formal determination on the applicability of the SCA.<sup>267</sup> If the contracting officer erroneously fails to apply SCA labor standards to a contract, DOL may retroactively require inclusion of the SCA contract clause and any applicable SCA wage determination in the contract, which will result in an appropriate equitable adjustment of the contract price.<sup>268</sup>

**Requirement to Submit Notice.** Standard Form (SF) 98 (Notice of Intention to Make a Service Contract and Response to Notice) and SF 98a (Attachment A to SF 98) must be submitted to DOL for solicitations, con-

tracts, modifications, and multiple-year contracts subject to the SCA.<sup>269</sup> Service employees are to be classified on the SF 98a in accordance with job titles stated in an applicable collective bargaining agreement (CBA) or, if no CBA applies, in conformance with the job titles specified in the DOL's Wage and Hour Division's *Service Contract Act Directory of Occupations*. Failure to use the standard job titles and definitions in that directory will cause a delay in the issuance of wage determinations.<sup>270</sup> Time requirements for submitting the SCA notice to DOL are specified at FAR 22.1008-7 and DFARS 222.1008-7. These provisions distinguish between recurring or known requirements, nonrecurring or unknown requirements, exceptional circumstances, and emergency situations. Failure to meet the applicable time requirement for a covered contract may result in the mandatory retroactive incorporation of wage rates and a corresponding equitable adjustment in the contract price.<sup>271</sup>

**Place of Performance Unknown.** The FAR establishes procedures to follow when all possible places of performance of a service contract cannot be identified prior to issuance of the solicitation.<sup>272</sup> These procedures include giving notice in the Commerce Business Daily synopsis of the acquisition that all potential locations for performance are not known by the contracting officer and that offerors must request wage determinations for additional places of performance by a specified date. Contractors must then provide timely notice of the place of performance or they risk not being fully reimbursed for wage rates mandated by an SCA wage determination. If a successful offeror does not make a timely request for a wage determination for the place where it will perform the contract and the contracting officer does not obtain a wage determination for that location, the contracting officer is to award the contract, request a wage determination, and incorporate the wage determination in the contract, retroactive to the date of award, without making an equitable adjustment in the contract price.<sup>273</sup>

**Incumbent Contractor with a Collective Bargaining Agreement (CBA).** If the incumbent contractor's employees are covered by a CBA, the SCA requires that the wage rates and fringe benefits under a new SCA contract shall not be less than the wage rates and fringe benefits provided for in the existing CBA, so long as that

<sup>262</sup> 41 U.S.C. §§ 351-358.

<sup>263</sup> 29 U.S.C. §§ 201-219.

<sup>264</sup> FAC 84-46, 8 May 1989.

<sup>265</sup> DAC 88-10, 24 July 1989.

<sup>266</sup> 41 U.S.C. §§ 35-45.

<sup>267</sup> FAR 22.1003-7; DFARS 222.1003-7.

<sup>268</sup> FAR 22.1015.

<sup>269</sup> FAR 22.1007, 53.301-98, and 53.301-98a.

<sup>270</sup> FAR 22.1008-2; DFARS 222.1008-2.

<sup>271</sup> FAR 22.1012-2(d).

<sup>272</sup> FAR 22.1009-4.

<sup>273</sup> FAR 22.1009-4(f) and 52.222-49.

agreement resulted from arm's length discussions between the incumbent contractor and the employee's labor union.<sup>274</sup> The FAR now requires that the contracting officer determine whether the incumbent contractor's employees are subject to a CBA that specifies their wages, that he obtain a copy of the CBA, and that the CBA be submitted to DOL along with the SF 98 and 98a notice of intention to enter into a service contract.<sup>275</sup> The wage rates and fringe benefits set forth in the CBA will not constitute a binding minimum for the service contract to be awarded if DOL determines either: 1) that the rates and fringe benefits in the CBA vary substantially from the prevailing rates for services in that locality; or 2) that the rates and fringe benefits did not result from arm's length bargaining between the predecessor contractor and the employees' labor union.<sup>276</sup> If a CBA sets the incumbent contractor's employees' wage rates, at least thirty days in advance of the earliest acquisition date the contracting officer must inform both the incumbent contractor and the employees' labor union of: 1) the forthcoming contract, modification, or multiyear contract, as applicable; and 2) all applicable acquisition dates.<sup>277</sup> This notice provision is important because the contracting officer's failure to give timely notice to the incumbent contractor and to the labor union may result after award in the retroactive incorporation of wage rates and fringe benefits into the contract. Those rates and fringes may well be substantially higher than those specified in the existing CBA. Without having received the required notice, the incumbent contractor may bid low on the contract and receive award, after which the labor union may substantially increase its wage rate and fringe benefit demands in negotiations for a CBA that will become the basis for a retroactively binding wage rate determination.<sup>278</sup>

#### *Davis-Bacon Act*

Labor standard provisions applicable to federal construction contracts were added to FAR subpart 22.4 last year. DAC 88-10 added DFARS subpart 222.4 to provide implementing instructions concerning the FAR provisions.<sup>279</sup>

#### *Sealed Bidding*

##### *Master Solicitations*

Provisions concerning master solicitations, which contain all of the contract terms and clauses that are required for acquisitions of a specific type of supply or

service that is procured repetitively, have been added to the FAR and removed from the DFARS. FAC 84-49 added two provisions to the FAR: 1) FAR 14.203-3, *Master Solicitation*, which defines and establishes procedures for using master solicitations; and 2) FAR 15.408(d), which provides that master solicitations may also be used in negotiated acquisitions in accordance with the foregoing FAR Part 14 criteria and procedures.<sup>280</sup> DAC 88-10 deleted DFARS 214.270 and 215.470 as a result of the new FAR coverage of master solicitations.<sup>281</sup>

#### *Mistake in Bid Procedures*

FAC 84-44 revised FAR 14.406-3(g)(1)(iv) to clarify the standard of disclosure that applies when requesting verification of a bid under circumstances in which there is reason to believe that the bid might contain a mistake. The FAR formerly required that the contracting officer advise the bidder of *sufficient* information to put the bidder on notice of the suspected mistake, but it did not require that the bidder be given *all* information that made the contracting officer suspect that a mistake had been made. The revision adopts the latter standard by requiring the contracting officer to inform the bidder of all properly disclosable information that leads the contracting officer to believe that a bid mistake may have been made.<sup>282</sup>

#### *Publicizing Contract Actions*

**Single classification code.** FAC 84-48 amended FAR 5.207(b)(4) and 5.207(g)(1) and (2) to clarify that only one classification code shall be included in synopses submitted to the Commerce Business Daily (CBD). The code selected should most closely describe the acquisition. If the acquisition is for a multiplicity of supplies, services, or a combination of both, the preparer of the synopsis should select the one category that best describes the overall acquisition based upon value. If more than one classification code is submitted or if the synopsis notice fails to include a code at all, the CBD will reject the synopsis. This change also includes the warning that CBD personnel will no longer edit the selected classification code for potential errors, so additional care should be exercised in selecting the single code most appropriate for the acquisition.<sup>283</sup>

**Telefaxed bids and proposals.** FAC 84-48 also revised FAR 5.207(c)(2)(xv) to provide that instructions should be given in synopsis item 17 for submission of facsimile machine numbers and routing instructions, if the con-

<sup>274</sup> 41 U.S.C. § 353(c).

<sup>275</sup> FAR 22.1008-3(a-d).

<sup>276</sup> FAR 22.1008-3(e).

<sup>277</sup> FAR 22.1010.

<sup>278</sup> FAR 22.1010-3(c) and (d)(2).

<sup>279</sup> DAC 88-10, 24 July 1989.

<sup>280</sup> FAC 84-49, 11 July 1989.

<sup>281</sup> DAC 88-10, 24 July 1989.

<sup>282</sup> FAC 84-44, 29 March 1989.

<sup>283</sup> FAC 84-48, 12 June 1989.

tracting office will accept requests for solicitations through alternate means (facsimile machine, Telex, etc.).<sup>284</sup>

#### *Fee for Solicitation Documents*

In *Consolidated Co-op.*<sup>285</sup> the Comptroller General confirmed the government's authority to charge prospective bidders a modest fee to receive copies of bid documents. GAO cited the User Charge Statute<sup>286</sup> as expressing the will of Congress that work, services, publications, or similar things of value or utility performed by federal agencies be as self-sustaining as possible, unless collection of a charge for the service is prohibited by law. In the instant case, the GAO found that this statute gave the Army authority to charge a \$25 fee to potential bidders for copies of the specifications and drawings relating to an invitation for bids.

#### *Change in the Five-Day Rule Regarding Late Bids*

FAC 84-53 changes or adds a number of FAR provisions pertaining to sealed bidding to: 1) correct language in the current five-day late bid rule concerning acceptable evidence to establish the date of mailing of a late bid, modification, or withdrawal sent by registered or certified mail; 2) provide a two-day late bid rule for bids mailed by U.S. Postal Service Express Mail Next Day Service; 3) provide separate late bid rules for bids outside the United States and Canada; and 4) allow contracting officers the option of permitting the use of facsimile equipment for the submission of bids, acknowledgement of amendments to solicitations, and modification or withdrawal of bids. Corresponding changes were also made for contracting by negotiations.<sup>287</sup>

#### *Converting from Sealed Bid to Negotiated Acquisition*

In *Cemco Products, Inc.*<sup>288</sup> the invitation for bids that the Department of Health and Human Services (HHS) issued for insulated pipe and fittings required that bid samples be furnished as part of the bid, stated that the samples would be tested for compliance with the solicitation requirements, and warned that a sample's failure to conform to requirements would result in rejection of the bid. Only two bidders responded, and neither of their bid samples conformed to the solicitation requirements. The contracting officer then informed both bidders by letter that new samples should be submitted and that no other changes to the bids would be permitted. The low bidder submitted a new sample, but the other bidder protested, arguing that if both bids were nonresponsive then the government should have

either cancelled the initial solicitation and issued a new sealed bid solicitation or formally converted the sealed bidding into a negotiated procurement under FAR 14.404-1(e)(1) and FAR 15.103. HHS asserted that it had done the latter. The Comptroller General agreed with the protester that HHS's attempt to permit submission only of new samples under the IFB did not constitute a proper conversion from sealed bidding to negotiations. The contractors could not revise the offers that they had originally submitted, not even their bid prices. GAO stated that because HHS did not permit the offerors' relative standing to change with respect to price, the offerors were not on an equal footing once the sealed bid procurement was converted to a negotiated acquisition.

#### *Commercial Activities Program*

##### *DOD Directive 4100.15*

On 10 March 1989 DOD Directive 4100.15 was republished with few changes.<sup>289</sup> The most important change implements section 1111 of the FY 1988/1989 DOD Authorization Act,<sup>290</sup> commonly known as the "Nichols Amendment," by delegating to each installation commander the authority to decide which commercial activities at the installation will be reviewed under the commercial activities procedures and when such reviews will be conducted. The Nichols Amendment was to expire on 1 October 1989, but section 1131 of the FY 1990/1991 DOD Authorization Act<sup>291</sup> extended it for one more year. If Congress does not extend it further, it is unlikely that DOD will continue this provision in the directive because it hampers the services' ability to meet their yearly study goals.

#### *Government Furnished Property*

The DAR Council recently approved a deviation to DFARS subpart 245.3 and 252.245 for the Army, which permits, during a two-year test period beginning on 27 September 1989, the Army to provide existing government property under installation support services contracts without retaining the responsibility for its replacement.<sup>292</sup> This deviation will allow the Army to save money by not having to replace used up or worn out property, which will be the contractor's responsibility. It will also reduce problems with the inventory of government property. Additionally, the deviation will reduce claims for defective property (because the property will be offered to prospective contractors "as is") and for delays in the procurement of replacement

<sup>284</sup> FAC 84-48, 12 June 1989.

<sup>285</sup> Comp. Gen. Dec. B-236822 (8 Sept. 1989), 89-2 CPD ¶ 224.

<sup>286</sup> 31 U.S.C. § 9701(a).

<sup>287</sup> FAC 84-53, 28 November 1989.

<sup>288</sup> Comp. Gen. Dec. B-234147; B-234147.2 (23 May 1989), 89-1 CPD ¶ 491.

<sup>289</sup> Dep't of Defense Directive 4100.15, Commercial Activities Program (March 10, 1989).

<sup>290</sup> Pub. L. No. 100-180, 101 Stat. 1019 (1987).

<sup>291</sup> Pub. L. No. 101-189, 103 Stat. 1352 (1989).

<sup>292</sup> 54 Fed. Reg. 39,537 (1989).

property. The big drawback to this approach, however, is that it may hamper the Army's ability to bring contracted out work back in-house, unless the Army includes a provision in the contract allowing the Army to purchase the contractor's replacement property.

#### *Challenges to Cost Comparison Decisions*

The issue of who has standing to challenge agency cost comparison decisions continues to create litigation and interest in Congress. In *CC Distributors, Inc. v. United States*<sup>293</sup> the court held that contractors affected by an Air Force decision to convert work back to an in-house operation had standing to challenge the decision for failure to comply with the cost comparison procedures in the FAR, DOD regulations, and OMB Circular A-76.

Three days later, however, that same court held in *National Federation of Federal Employees v. Cheney*<sup>294</sup> that federal employees and their unions lack standing under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, to challenge agency decisions to contract out. Standing was lacking because neither the employee's nor the union's interest in protecting employee jobs was within the zone of interests intended to be protected by the statutes and regulations allegedly violated. In fact, those interests, which were budget coordination and efficiency through greater reliance on the private sector, were actually contrary to those of the union and the employee.

While the court turned the union away from the courthouse door in the previous case, it was busy in another case granting unions the right to bargain concerning the impact and implementation of the cost comparison procedures in OMB Circular A-76 under collective bargaining agreements.<sup>295</sup> This decision is contrary to those in the Fourth and Ninth Circuits, however, and the Supreme Court has agreed to resolve this split.<sup>296</sup>

Congress may also give unions and federal employees a new forum to challenge agency cost comparison decisions. The Contracting Out Appeals Reform Act of 1989<sup>297</sup> would give federal employees whose jobs are jeopardized by an agency's decision to contract out the right to protest that decision to the Comptroller General. Currently, only the agency appeals procedure is available to employees to challenge these decisions. The bill has not yet been reported out of the Government Affairs Committee.

#### *Cost Comparison Cases*

The Comptroller General continues to resolve many challenges to individual cost comparisons. In *Paige's Security Services, Inc.*<sup>298</sup> the Comptroller General held that it was not unfair to compare the in-house cost of paying military salaries with a contractor's personnel costs, even though the military is not subject to the Service Contract Act<sup>299</sup> and thereby gained a competitive advantage. In *DynCorp*,<sup>300</sup> however, the Comptroller General stated that if the Air Force planned to convert its in-house work force from military to civilian rather than contract for these services, then the projected costs of that conversion must be included in the in-house bid.

In *PSC, Inc.*<sup>301</sup> the Comptroller General allowed the Army to apply the ten percent conversion differential to the contractor's bid, instead of the in-house bid. The work was being performed temporarily in-house after a previous contractor had been terminated for default. Because the work had previously been contracted out, the transfer cost study method described in the Cost Comparison Handbook Supplement to OMB Circular A-76 theoretically should have been used. This method requires the ten percent conversion differential to be applied to the in-house bid. Nevertheless, GAO did not object to applying it to the contractor's bid in this case because the solicitation indicated that a standard cost study would be performed. Because the Army followed its solicitation procedures, the protestor was not prejudiced.

In *Logistical Support, Inc.*<sup>302</sup> the GAO upheld the Air Force's decision to conduct a cost comparison study by a solicitation restricted to small disadvantaged business (SDB) concerns because no abuse of discretion could be found and because no regulation or statute prohibited such a set-aside for an A-76 cost comparison study. By setting the solicitation aside for SDB concerns, potentially less costly non-SDB concerns could not compete and the Air Force increased the chances that the work would remain in-house.

#### *Automatic Data Processing Equipment Acquisitions Regulations*

The General Services Administration has embarked upon a program to update the Federal Information

<sup>293</sup> 883 F.2d 146 (D.C. Cir. 1989).

<sup>294</sup> 883 F.2d 1038 (D.C. Cir. 1989).

<sup>295</sup> Department of the Treasury v. Federal Labor Relations Council, 862 F.2d 880 (D.C. Cir. 1989).

<sup>296</sup> Department of the Treasury v. Federal Labor Relations Council, cert. granted, 58 U.S.L.W. 3212 (U.S. Oct. 3, 1989) (No. 88-2123).

<sup>297</sup> S.1265, 101st Cong., 1st Sess. 135 Cong. Rec. S7517 (1989).

<sup>298</sup> Comp. Gen. Dec. B-235254 (9 Aug. 1989), 89-2 CPD ¶ 118.

<sup>299</sup> 41 U.S.C. §§ 351-358.

<sup>300</sup> Comp. Gen. Dec. B-233727.2 (9 Jun. 1989), 89-1 CPD ¶ 543.

<sup>301</sup> Comp. Gen. Dec. B-236004.1 (26 Oct. 1989), 89-2 CPD ¶ 380.

<sup>302</sup> Comp. Gen. Dec. B-234621 (24 May 1989), 89-1 CPD ¶ 500.

Resources Management Regulation (FIRMR).<sup>303</sup> GSA has promised a complete reprint of the FIRMR including all changes in the very near future. In the meantime, GSA has issued two amendments to the FIRMR that make several minor changes.<sup>304</sup>

#### *"All or None" Acquisitions*

In *PacifiCorp Capital, Inc.*<sup>305</sup> the GSBGA rejected a Navy requirement that offerors propose on all line items in a hardware acquisition, which was to be a ten-year requirements contract. The requirement was unduly restrictive of competition because it limited competition for some items on which several vendors could have competed if the procurement had not been an "all or none" competition. In *Telos Field Engineering*<sup>306</sup> the GSBGA rejected the "bundling" of hardware and software maintenance where there was only one source for the software maintenance. The underlying message from the board is that an "all or none" requirement in ADPE acquisitions will rarely, if ever, be upheld if challenged as overly restrictive.

#### *Used Equipment*

The used equipment vendors have aggressively challenged solicitation requirements that exclude used equipment. In *InSyst Corp.*<sup>307</sup> the GSBGA ordered the General Services Administration to consider offers of used equipment for their multiple award schedule program. Other vendors have successfully settled protests against the inclusion of "new only" requirements.<sup>308</sup>

#### *Multiple Award Schedule Contracts*

In *Systemhouse Federal Systems, Inc.*<sup>309</sup> the GSBGA ruled that orders placed under a multiple award schedule contract must be synopsisized pursuant to 15 U.S.C. § 637(e)-(g). This decision is contrary to the GSA's position in one of its handbooks, which the board treated as a regulation, and to FAR 8.404(a), which states that there is no further synopsis requirement for orders placed under Federal Supply Schedules such as multiple award schedules.

#### *Navy/IBM v. The Gang of Six*

In November 1989 the House Government Operations Committee conducted hearings on the alleged bias of the

Navy towards IBM equipment and on allegations of gratuities given by IBM to the Navy.<sup>310</sup> One important legal issue raised in the hearings was the status of system integrators under the Walsh-Healey Act.<sup>311</sup> Many system integrators supply both the hardware and the software for large, custom-designed computer systems, but they neither manufacture ADPE nor maintain an inventory of ADPE. Therefore, some have alleged that systems integrators are not manufacturers or regular dealers as required by the Walsh-Healey Act. Contracting activities should expect protests, new regulations, and legislation in this area.

### *Intellectual Property*

#### *Regulations*

The major news in intellectual property is that the Department of Defense has gone an entire year without changing its regulations on technical data, although FAC 84-48 revised the FAR patent rights provisions.<sup>312</sup> The changes implemented revisions to government patent policy promulgated by the Commerce Department in 52 Fed. Reg. 8552 (1987), 37 C.F.R. Part 401, pursuant to Pub. L. No. 98-620. These changes affect small businesses and educational institutions.

#### *Patent Infringement*

*Trojan, Inc. v. Shat-R-Shield, Inc.*<sup>313</sup> restates the rule that a patent owner may not prevent a competitor from offering to sell an infringing product to the United States.

#### *Rights of Subcontractors*

*Dowty Decoto, Inc. v. Department of the Navy*<sup>314</sup> and *Ford Aerospace Corp. v. Garrett*<sup>315</sup> address the rights of subcontractors under the data rights clauses. In *Dowty* the subcontractor was able to enjoin the Navy from disclosing data owned by the subcontractor. The court also stated in *dicta* that the Navy's failure to challenge the restrictive legends for ten years might have provided a separate basis for its holding. In *Ford Aerospace* the subcontractor did not identify the data that it intended to submit with limited rights in the schedule, as required by the clause. This failure pre-

<sup>303</sup> See 54 Fed. Reg. 5904 (1989); 54 Fed. Reg. 41,850 (1989).

<sup>304</sup> See FIRMR Amendment 16, 54 Fed. Reg. 35,496 (1989) (management reviews); FIRMR Amendment 17, 54 Fed. Reg. 37,462 (1989) (making changes for consistency with the FAR).

<sup>305</sup> GSBGA No. 9733-P, 89-1 BCA ¶ 21,378.

<sup>306</sup> GSBGA No. 9802-P, 89-1 BCA ¶ 21,533.

<sup>307</sup> GSBGA No. 9946-P, 89-3 BCA ¶ 21,911.

<sup>308</sup> See Federal Systems Group, Inc., GSBGA No. 10114-P, 1989 BPD ¶ 178.

<sup>309</sup> GSBGA No. 10227-P, 90-1 BCA ¶ \_\_\_\_ (27 Oct. 1989).

<sup>310</sup> 52 Fed. Cont. Rep. (BNA) 836 (13 Nov. 1989); 52 Fed. Cont. Rep. (BNA) 912 (20 Nov. 1989).

<sup>311</sup> 41 U.S.C. §§ 35-45.

<sup>312</sup> FAC 84-48, 12 June 1989.

<sup>313</sup> 885 F.2d 854 (Fed. Cir. 1989).

<sup>314</sup> 883 F.2d 774 (9th Cir. 1989).

<sup>315</sup> No. 89-1445 (D.D.C. 1989).

vented the subcontractor from enjoining the disclosure of the data.

### *Negotiated Acquisitions*

#### *Source Selection*

It appears that the General Accounting Office is more closely scrutinizing source selection decisions. In *TRW, Inc.*<sup>316</sup> the GAO granted a protest by a high technical, high cost offeror against the award to a much lower technical, but only slightly lower cost offeror. The evaluation criteria had made technical factors much more important than cost, and the decision therefore appeared to be inconsistent with the criteria. Similarly, in *Coastal Science and Engineering, Inc.*<sup>317</sup> the GAO overturned an award to a much higher priced offeror whose technical score was slightly higher. These cases demonstrate the importance of accurately disclosing the evaluation factors, following them, and documenting the reasons for a particular selection decision. In a period of tight budgets, cost or price should undoubtedly be a significant factor and should be weighted accordingly.

In *Pan Am World Services, Inc.*<sup>318</sup> the GAO stated that Source Selection Evaluation Plans are internal regulations that do not give rights to offerors. Therefore, a failure to follow an SSEP will not necessarily require reversal of an award if there is a rational basis for the decision and it is in accordance with the evaluation criteria.

#### *Evaluation Criteria*

In *Kilgore Corp.*<sup>319</sup> the GAO interpreted 10 U.S.C. § 2305(a)(3) as not requiring "quality" to be an evaluation factor in every negotiated procurement. The GAO believes that the statute and its implementing regulation, FAR 15.605(b), merely require disclosure of the relative importance, if any, attached to quality factors.

#### *Bait and Switch*

In *EDS Federal Corp.*<sup>320</sup> the GSBGA found that Planning Research Corp. (PRC) proposed based upon employing a group of highly qualified PRC personnel. PRC actually intended to perform with different, less qualified, personnel hired from the unsuccessful incumbent contractor. The agency had reason to know of PRC's intended plan, but evaluated its proposal as submitted with the more highly qualified personnel. The board granted the protest. Contracting activities acquiring the services of highly skilled personnel would therefore do well to: 1) require the submission of resumes and

letters of intent as part of the technical proposal; 2) include a key personnel clause to ensure that the offeror is obligated to provide the proposed personnel; and 3) evaluate personnel as a factor in the source selection plan.

### *Responsibility Determinations*

#### *DOD Contractor Performance Review System*

DOD has chartered a task force to develop a DOD-wide system to consider contractor past performance in source selection decisions. The Contractor Performance Review System (CPRS) will entail collecting data on contractors' past performance and providing that data to acquisition and contracting officials to aid them in making award decisions. The charter calls for a six-member task force consisting of the Service Acquisition Executives and a representative from the Defense Logistics Agency, the DOD General Counsel, and the Deputy Assistant Secretary of Defense (Procurement). A detailed implementation plan was to be prepared and submitted to the Under Secretary of Defense (Acquisition) by 8 December 1989.<sup>321</sup>

#### *Possible Negligence Not Sufficient to Invalidate Affirmative Responsibility Determination*

In *EPD Enterprises, Inc.*<sup>322</sup> the Comptroller General held that a contracting officer's possible negligence in determining an offeror to be responsible was not sufficient to overturn the affirmative determination. The protestor had informed the contracting officer of past antitrust actions against the offeror, which had resulted in a consent decree in one action and a no contest plea and a fine in excess of \$300,000 in the other. The protestor also reported that the offeror was pending criminal charges and a civil suit alleging civil racketeering charges. The protestor provided copies of the complaint and the amended complaint of the latter civil action to the contracting officer. The protestor contended that the contracting officer's failure to obtain public records about the pending charges constituted negligence. The Comptroller General stated that an affirmative determination will not be reviewed without a showing that it was made fraudulently or in bad faith or without proof that definitive responsibility criteria in the solicitation were not met. Finding only possible negligence on the part of the contracting officer, the GAO held that the scope of its review of affirmative responsibility determinations does not extend to cases involving negligence.

<sup>316</sup> Comp. Gen. Dec. B-234558 (21 June 1989), 89-1 CPD ¶ 584.

<sup>317</sup> Comp. Gen. Dec. B-236041 (7 Nov. 1989), 89-2 CPD ¶ \_\_\_\_.

<sup>318</sup> Comp. Gen. Dec. B-235976 (28 Sept. 1989), 89-2 CPD ¶ 283.

<sup>319</sup> Comp. Gen. Dec. B-235813.2 (7 Nov. 1989), 89-2 CPD ¶ \_\_\_\_\_, *aff'g* 89-1 CPD ¶ 576.

<sup>320</sup> GSBGA No. 9869-P, 89-2 BCA ¶ 21,655.

<sup>321</sup> See 52 Fed. Cont. Rep. (BNA) 690 (16 Oct. 1989) for a copy of the charter.

<sup>322</sup> Comp. Gen. Dec. B-234193 (21 Feb. 1989), 89-1 CPD ¶ 182.

*Army CID Report on Fraud Investigation Supports  
Nonresponsibility Determination*

In *Energy Management Corporation*<sup>323</sup> the GAO decided that an Army Criminal Investigation Division report was sufficient to support a nonresponsibility determination without an independent investigation by the contracting officer. GAO found that the CID report contained sufficient information from which the contracting officer could conclude that the protestor's performance under a recent contract raised serious doubts as to the integrity of the company and of its president.

*Subject of an Investigation May Be Found Responsible*

In *Krug International*<sup>324</sup> the protestor contended that because the offeror was a subject in the "Operation Ill Wind" investigation, the contracting officer could not in good faith have found the offeror to be responsible. The offeror had complied with special DOD-wide guidelines in effect at that time, including describing the steps that it took to determine whether it had engaged in any illegal conduct in the subject procurement and contractually agreeing to permit the government to recover anticipated profits if it was later determined that the offeror had engaged in illegal conduct. The contractor had also submitted evidence of additional measures taken to avoid unethical conduct. Based upon the above information, which the contracting officer had considered, the Comptroller General held that there was no basis for concluding that the contracting officer had acted in bad faith in finding the offeror responsible.

*Later Suspension Did Not Negate Earlier Responsibility  
Determination*

In *Krug International—Request for Reconsideration*<sup>325</sup> the protestor requested a reconsideration of the above decision, contending that new facts demonstrated that the contract had been improperly awarded. The protestor pointed to the subsequent suspension of the contractor from competing for and receiving future contracts. It argued that if the information that the contracting officer had previously considered was not adequate to find the contractor presently responsible now, then the information must also have been inadequate to support a finding of present responsibility then. The Comptroller General held, however, that the subsequent suspension did not negate the earlier affirmative responsibility determination. A responsibility determination must be reviewed on the information then available. Finding no factual or legal error in its prior decision, GAO affirmed that decision.

*Wiretap Investigation as Basis for Finding Bidder  
Nonresponsible*

The U.S. District Court for the District of Columbia held in *Cubic Corp. v. Cheney*<sup>326</sup> that the Air Force could base a finding of nonresponsibility on affidavits that had been prepared to obtain warrants to search the residences and offices of a contractor and an Air Force official. The affidavits were created to support warrants obtained by FBI and NIS investigators in the Operation Ill Wind investigation. In making an award on a contract for a combat training system, the contracting officer considered the evidence contained in the affidavits. The court concluded that nonresponsibility determinations are not proceedings subject to Title III of the Omnibus Crime Control and Safe Streets Act,<sup>327</sup> which restricts the use of wiretap evidence at a trial, hearing, or other proceeding. The court reasoned that the Title III provision applies to adversarial proceedings, which include GAO bid protest proceedings, but they do not include non-adversarial administrative business determinations such as a contracting officer's nonresponsibility determination.

*Sureties*

*New Individual Surety Provisions*

FAC 54-53 has substantially changed the rules governing individual sureties. Effective 28 February 1990, bonds supported by individual sureties must include not only an affidavit that lists their assets, liabilities, and net worth, but must also include a pledge of specific assets equal to the bond's penal amount.<sup>328</sup> To pledge real estate, a surety will be required to furnish a recorded lien in favor of the government, supported by evidence of title. To pledge assets other than real estate, the assets will have to be placed in an escrow account.<sup>329</sup>

*CPA Certification of Accounting Data for Individual  
Sureties*

In *Consolidated Industrial Skills Corporation*<sup>330</sup> a contractor protested a solicitation provision that required offerors who provided individual sureties to submit a certified public accountant's (CPA's) audited financial statement as evidence of each individual surety's net worth. The Navy issued the request for proposals as a small business set-aside for base maintenance and utilities operations. The protester contended that the financial statement requirement was unduly restrictive of competition because it was so onerous that it effectively eliminated the availability of individual sureties as a

<sup>323</sup> Comp. Gen. Dec. B-234727 (12 July 1989), 89-2 CPD ¶ 38.

<sup>324</sup> Comp. Gen. Dec. B-232291.2 (6 Feb. 1989), 89-1 CPD ¶ 116.

<sup>325</sup> Comp. Gen. Dec. B-232291.3 (28 June 1989), 89-2 CPD ¶ 10.

<sup>326</sup> No. 89-1617 (D.D.C. Aug. 8, 1989).

<sup>327</sup> 18 U.S.C. § 2515.

<sup>328</sup> See FAR 28.203.

<sup>329</sup> FAC 54-53, 28 November 1989.

<sup>330</sup> Comp. Gen. Dec. B-236239.2 (6 Oct. 1989), 89-2 CPD ¶ 328.

source of bonding. The protester submitted evidence from two CPA's that they never prepare audited personal financial statements, although they often prepare compiled personal financial statements for potential individual sureties. The CPA individually verifies or attests to information in an "audited" statement, whereas a "compiled" statement contains only the unverified information submitted by the individual surety. The GAO, however, noted evidence presented by the contracting officer that persons who sign Standard Form (SF) 28, Affidavit of Individual Surety (FAR 53.301-28), often do not understand what they are signing and do not have personal knowledge of the surety's net worth. GAO also noted that the contracting officer is obligated to determine the acceptability of individual sureties under FAR 28.202-2 and that the contracting officer is not limited to considering just the information submitted on the SF 28.<sup>331</sup> In light of the wide degree of discretion afforded to the contracting officer in determining the suitability of sureties and considering that "compiled" financial statements are of limited value in determining a surety's net worth, the GAO found that requiring CPA-audited financial statements of potential sureties is reasonable and is not an unduly restrictive solicitation requirement.

#### *Government Not Obligated to Protect Surety's Interests*

In *William A. Ransom v. United States*<sup>332</sup> the low bidder on a contract to rehabilitate housing units at Edwards Air Force Base provided two individual sureties on its bid bond. After bid opening and receipt of the contracting officer's request to verify its bid, the bidder asserted that it made an error in its bid and requested an increase of nearly \$400,000 in its bid price to correct the error. The Air Force determined that there was clear and convincing evidence of an error, but not of the intended bid. Therefore, it did not permit the bidder to amend its bid, although it gave the bidder an opportunity to withdraw the bid. The Air Force did not notify the two individual sureties of these matters, however. Rather than withdraw its bid, the low bidder elected to perform the contract at the bid price. Unfortunately, the contractor fell behind schedule in performing the contract, in part due to government-caused delays. The Air Force later terminated the contract for default due to the contractor's failure to progress on an amended schedule. Meanwhile, the contractor had been paid about \$1,150,000 in progress payments. The sureties completed performance of the contract and, after the contracting officer denied their claims, filed suit in the Claims Court. The sureties argued that the Air Force's failure to notify them of the contractor's option to withdraw its bid constituted a breach of the government's duty to act fairly and in good faith in dealing with bondsmen. They also asserted that payment of the last progress payment to the contractor breached the government's duty to deal

fairly and in good faith with the bondsmen and to consider their interests. In response to the sureties' first argument, the Claims Court concluded that: 1) a bid bond obligates the surety but not the government; 2) no precedent in the Federal Circuit recognizes a bid bond surety's cause of action in these circumstances; 3) no written or express oral agreement existed between the sureties and the government; 4) the circumstances present here did not justify finding an implied contract under which the government assumed an obligation to inform the sureties of the problems in the contractor's bid; and 5) because there was no express or implied contract between the government and the sureties, the government had no duty to disclose its superior knowledge regarding the bid to the sureties. In support of their second argument, the sureties maintained that the contractor's performance of the contract was so deficient that the Air Force, in fulfillment of the government's duty to exercise reasonable care to prevent loss or damage to the sureties, should have stopped making progress payments even before receiving notice from the sureties. The Claims Court ruled as a matter of law that before any government obligation arises to withhold or divert funds, the government must be notified that the sureties believe that the contractor is in default and cannot complete the contract. The essence of this case is that the government has no obligation to provide information to a surety about a contractor's potential or demonstrated inability to perform in accordance with the bid on which the surety has provided a bond.

#### *Government Employee as Bid Bond Surety*

The Navy rejected a contractor's bid as nonresponsive solely because one of the contractor's two individual sureties was a government employee. The contracting officer determined that FAR 3.601, which prohibits the award of government contracts to federal employees except when there is a compelling reason to do so, precluded the use of federal employees as sureties because the government could turn to the surety for contract performance in case of a default. The Comptroller General observed that the purpose of that FAR prohibition is to avoid any conflict of interest that might arise from the award of a government contract to a federal employee. The GAO also noted that the contracting officer and the surety have a number of options available for fulfilling the surety's obligation if default occurs, which is usually accomplished by the surety arranging to have another contractor complete the contract rather than by the surety completing the contract himself. Because the likelihood of a conflict of interest arising between the government and the surety is remote, the GAO determined that the surety's status as a government employee did not raise a conflict of interest and the federal employment of the surety should not have been the basis for rejection of the bid.<sup>333</sup>

<sup>331</sup> Hughes & Hughes, Comp. Gen. Dec. B-235723 (6 Sept. 1989), 89-2 CPD ¶ 218.

<sup>332</sup> 17 Cl. Ct. 263 (1989).

<sup>333</sup> John Peeples, Comp. Gen. Dec. B-233167 (21 Feb. 1989), 89-1 CPD ¶ 178.

### Small Purchases

In *Adrian Supply Co.*<sup>334</sup> the GAO held that language requesting quotations by a certain date cannot be construed as establishing a firm closing date for receipt of quotations, absent a late quotations provision expressly providing that quotations must be received by that date to be considered. Citing *Instruments & Controls Serv. Co.*,<sup>335</sup> the GAO further stated that if a firm closing date is not set, then the contracting agency should consider any quotations received prior to award if no substantial activity has transpired in evaluating the quotations. In this case, however, GAO found that substantial activity had transpired because the agency had, prior to learning of Adrian's quotation, already examined the quotations received, prepared an abstract, decided that a purchase order should be issued to a certain contractor, and forwarded the approval form to the contracting officer. In addition, because the agency has so many small purchases to process on any given day, the GAO stated that it would be unnecessarily burdensome to require the agency to retrieve procurement files that are already in the process of being awarded and to reconsider their award decisions whenever a quotation is received after the award process has been initiated.

### Order of Precedence Clause

In *Hensel Phelps Construction Company v. United States*<sup>336</sup> the Court of Appeals for the Federal Circuit clarified when a contractor is justified in relying upon the order of precedence clause<sup>337</sup> to resolve a discrepancy between the drawings and specifications. The contractor and its subcontractor had noticed and resolved a discrepancy using the clause. The ASBCA had denied the contractor's claim, however, holding that a contractor could not rely on the clause when it knew of a discrepancy and did not seek clarification.<sup>338</sup> The court held that a contractor must seek clarification where an internal discrepancy in the figures, drawings, or specifications is found or should have been found, but that an order of precedence clause may be relied upon to resolve a discrepancy between the specifications and drawings, even though the discrepancy is patent or is known to the contractor prior to bid. Therefore, the court reversed the board's decision.

### Mistake in Bid Recovery

The board held in *Taylor & Sons Equipment Company*<sup>339</sup> that a contractor that is entitled to relief

because of a mistake in bid of which the government should have been aware may not recover an amount in excess of the difference between its bid and the next lowest bid. This is because the contracting officer was bound by law to make contract awards to the lowest responsible bidders. The board stated that to allow a recovery above that of the second lowest bidder would construct a contract that the parties never intended, that the contracting officer had no authority to make, and that would reimburse the contractor in excess of the benefit conferred upon the government as result of the mistake.

### Termination Cases

#### Failure to Complete "Punch List" Items

In *Southland Construction Co.*<sup>340</sup> the board upheld the government's termination of a construction contract for default, despite the contractor's substantial completion of the contract, because the contractor had failed to complete correction of "punch list" items on time. Although boards often find equitable grounds to avoid upholding the sometimes harsh termination remedy in substantial completion cases, the contractor in this case had no excuse for not completing a substantial portion of the punch list items within a reasonable time after receiving notice of their existence. This case is also interesting in that the contractor had claimed that the default termination should be overturned because the government had breached the contract by interfering with and unreasonably delaying contract performance. A government inspector sometimes used "harsh and vulgar" language towards the contractor's project manager and sometimes "lost his temper" in dealing with him. The board stated, however, that the government's duty to cooperate is not breached unless the behavior is so outrageous as to justify the contractor's refusal to continue because of its inability to maintain a work force.

#### Failure to Consider a FAR Factor Before Terminating for Default

In *Lafayette Coal Company*<sup>341</sup> the contracting officer failed to consider one of the factors listed in the FAR for consideration before terminating a contract for default. Lafayette, relying on *Darwin Construction Company v. United States*,<sup>342</sup> argued that the contracting officer abused her discretion by not considering all of the required factors and that the termination for default should be converted to a termination for convenience.

<sup>334</sup> Comp. Gen. Dec. B-235352 (2 Aug. 1989), 89-2 CPD ¶ 99.

<sup>335</sup> Comp. Gen. Dec. B-222122 (30 June 1986), 65 Comp. Gen. 685, 86-2 CPD ¶ 16.

<sup>336</sup> 886 F.2d 1296 (Fed. Cir. 1989).

<sup>337</sup> FAR 52.236-21.

<sup>338</sup> Hensel Phelps Construction Company, ASBCA No. 35767, 88-3 BCA ¶ 20,701.

<sup>339</sup> ASBCA No. 34675, 89-2 BCA ¶ 21,584.

<sup>340</sup> VABCA Nos. 2217, 2543, 89-1 BCA ¶ 21,548.

<sup>341</sup> ASBCA No. 32174, 89-3 BCA ¶ 21963.

<sup>342</sup> 811 F.2d 593 (Fed. Cir. 1987).

nience. The board responded by saying that Lafayette sought too much in arguing that a failure to consider one or more of these factors necessitated conversion of the termination for default. The board held that the mere failure to consider one or more of these factors is not an automatic admission ticket to a termination for convenience. Instead, it is but one factor to consider in looking at the totality of the circumstances behind the contracting officer's actions.

#### *Duty to Inquire Before Enforcing a Contract*

In *Insul-Glass, Inc.*<sup>343</sup> the government terminated a contract for the replacement of windows in a federal building because the contractor submitted drawings that did not comply with specifications. A letter accompanying the drawings, however, indicated that the contractor would comply with the specifications. In deciding the case the GSBICA expanded established principles and created a duty to inquire before terminating a contract for default. The board held that

[w]hen faced with appellant's two inconsistent statements as to muntin grillage, one of which (the drawings) could support a default termination and the other which (the letter) could not, respondent was obligated to inquire of appellant which statement it meant to rely on before unilaterally deciding that the drawings reflected appellant's intent. Because a question remained as to appellant's treatment of the muntins at the time respondent terminated the contract for default, respondent may not rely on an improper showing of grillage as a reason for finding the shop drawings to be in error.

The board therefore converted the termination for default to a termination for convenience.

#### *Demand for Return of Unliquidated Progress Payments—Is This a "Money Oriented" Consequence of the Default Termination as Contemplated by "Malone?"*

In *Crippen & Graen Corp. v. United States*<sup>344</sup> the Claims Court ruled that "although both the default claim and the demand for return of the unliquidated progress payments relate to the same contract, this fact alone does not confer jurisdiction over a contracting officer's demand that does not constitute a final decision." The court agreed that the validity of the default may impact the final decision for return of the unliquidated progress payments, but it also stated that

the 'money oriented' consequences of a decision on the validity of the default, as contemplated by the Federal Circuit in *Malone*, 849 F.2d at 1445, relate to potential liability of the contractor for procurement costs, or of the government for termination for convenience costs. Thus, the default claim and

the demand for return of liquidated progress payments are separate and distinct, and may be treated as such now by the court for jurisdictional purposes.

#### *Changed Circumstances: A Deterioration in Business Relationship and Discourteous Conduct Justifies Convenience Termination*

The Claims Court held in *Embrey v. United States*<sup>345</sup> that deteriorated business relations coupled with inadequate performance justified the convenience termination of a contract. In responding to the contracting officer's charges of unsatisfactory performance, the contractor wrote a letter to the contracting officer's supervisor. In that letter, the contractor described the contracting officer as an "arrogant jerk," "a bully," "a running sore of malcontent," and an individual who "won't change, without the pain and suffering he apparently needs." After receiving the contractor's letter and the contracting officer's request to terminate the contract for the convenience of the government, the supervisor reviewed the contract documentation and, in an effort to resolve the problem, met separately with the parties. As a result of these meetings, the supervisor concluded that the business relationship between the parties was irreconcilable. After receiving the concurrence of his supervisor, the contracting officer terminated the contract for the convenience of the government. Citing *Tornello v. United States*,<sup>346</sup> the court emphasized that the government may only use the convenience termination clause where the circumstances of the bargain or the expectations of the parties have changed. Nevertheless, the court held in this case that the deterioration in the business relationship and the contractor's unsatisfactory performance changed the bargain and the expectations of the parties. Accordingly, the court decided that the termination for convenience decision was not arbitrary, capricious, or taken in bad faith.

#### *Failure to Submit Settlement Proposal (Termination for Convenience) Within One Year*

In *Do-Well Mach. Shop, Inc. v. United States*<sup>347</sup> the Court of Appeals for the Federal Circuit affirmed the ASBCA's holding that the termination for convenience clause, which limits the contractor's right to submit a termination settlement claim to one year, was not contrary to the Contract Disputes Act. The court concluded that there is no language in the CDA or its legislative history to preclude the parties from agreeing to such a limitations period.

In *Harris Corporation*<sup>348</sup> Harris submitted a timely settlement proposal, but failed to certify it. Citing *Do-Well*, the government argued that Harris had no legal right to appeal the contracting officer's refusal to

<sup>343</sup> GSBICA No. 8223, 89-1 BCA ¶ 21361.

<sup>344</sup> 18 Cl. Ct. 237 (1989).

<sup>345</sup> 17 Cl. Ct. 617 (1989).

<sup>346</sup> 231 Ct. Cl. 20, 681 F.2d 756 (1982).

<sup>347</sup> 870 F.2d 637 (Fed. Cir. 1989).

<sup>348</sup> ASBCA No. 37940, 89-3 BCA ¶ 22,145.

consider its claim because it failed to submit a sufficient proposal before the expiration of the one-year period. The board noted, however, that in the cases cited by the government, including *Do-Well*, the contractors were time-barred because they failed to submit *any* proposal within the one-year period. The board noted that Harris did submit a proposal within one year and ruled that Harris's submission of an otherwise timely and complete settlement proposal was not a legal nullity, even though it was uncertified, because: 1) unlike claims, there is no statutory requirement that a termination settlement proposal be certified; 2) the regulations did not make it a nullity; 3) the contract contained no provision precluding the contractor from correcting the problem; and 4) because the proposal serves as a device for initiating an ongoing negotiation process, there is no logical reason to preclude a contractor from curing a defect in the certification within a reasonable time after the one-year period has expired.

### *Bankruptcy*

#### *Challenge to Default Termination*

The General Services Board of Contract Appeals ruled in *Defense Technologies, Inc.*<sup>349</sup> that the Bankruptcy Code's automatic stay provision did not apply to the contractor's challenge of a default termination. The board noted that the automatic stay provision<sup>350</sup> is only applicable to administrative and judicial proceedings *against* the debtor. The appeal here did concern a "government claim" because the government has the burden of proof in sustaining a default termination. The board concluded, however, that the appeal action was not one "against the debtor" because the litigation was for the benefit of the contractor. If successful in its appeal, the contractor would avoid any liability for excess procurement costs and would be able to recover its costs under the termination for convenience clause.

#### *Government Claim for Erroneous Overpayment*

In *Futuronics Corporation*<sup>351</sup> the ASBCA held that the Bankruptcy Code's automatic stay provision did apply to a government determination that the contractor was liable to it for an erroneous overpayment.

### *Costs and Cost Accounting*

#### *Cost Accounting Standards (CAS) Board*

In an effort to remove a roadblock to reviving the Cost Accounting Standards Board,<sup>352</sup> the Office of

Government Ethics has opined that the industry member of the board may participate in decisions if the member is granted a waiver under 18 U.S.C. § 208(b) and if he or she does not participate in matters that specifically impact upon the industry member's employer.<sup>353</sup>

#### *Change in Allocation Method*

In *PACCAR, Inc.*<sup>354</sup> the board refused to permit a contractor to change its allocation method retroactively. The contractor had changed its allocation method to comply with the CAS, and the change increased the costs on government work. The Defense Contract Audit Agency (DCAA) had failed to discover the contractor's noncompliance with the CAS earlier, but the board stated that this was not a sufficient reason to allow the contractor to change its allocation method retroactively. Under FAR 52.230-3(a)(2), the contractor is required to submit notice in advance of any changes to its accounting practices.

#### *Reasonableness of Costs*

*Bruce Construction Corp., et al. v. United States*<sup>355</sup> is still good law. Two recent appeals, decided under earlier versions of the cost principles, allocate the burden of proving unreasonableness to the party challenging an incurred cost.<sup>356</sup> These appeals do not discuss FAR 31.201-3, which assigns the burden of proving reasonableness to the contractor if the contracting officer challenges the reasonableness of an incurred cost. If and when the boards do start to follow FAR 31.201-3, however, it is likely that proof that a cost was incurred will be prima facie evidence of reasonableness, which the boards will require the government to rebut.

#### *Lobbying*

The "Byrd Amendment," section 319 of the Department of the Interior and Related Agencies Appropriations Act, 1990,<sup>357</sup> imposes detailed controls on lobbying of members of Congress *or* any federal officer or employee by contractors and grantees. Effective on 23 December 1989, the new restrictions prohibit recipients of a federal contract, grant, loan, or cooperative agreement from using, both directly and indirectly, any appropriated funds from *any* act to influence or attempt to influence the awarding of any contract, grant, loan, or cooperative agreement, to include extensions or modifications thereof. That portion of a contract payment allocable to the contractor's profit is not considered to

<sup>349</sup> GSBGA Nos. 9570, 9571, 90-1 BCA ¶ \_\_\_\_ (11 Oct. 1989).

<sup>350</sup> 11 U.S.C. § 362.

<sup>351</sup> ASBCA No. 36074, 89-3 BCA ¶ 22,208.

<sup>352</sup> See Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679, § 5, 102 Stat. 4055 (1988), which recreated the CAS Board after a nearly ten year hiatus.

<sup>353</sup> 52 Fed. Cont. Rep. (BNA) 601 (2 Oct. 1989).

<sup>354</sup> ASBCA No. 27978, 89-2 BCA ¶ 21,696.

<sup>355</sup> 163 Ct. Cl. 97, 324 F.2d 516 (1963).

<sup>356</sup> General Electric Company, ASBCA No. 28753, 89-1 BCA ¶ 21,445; Thiokol Corp., ASBCA No. 32629, 89-3 BCA ¶ 22,063.

<sup>357</sup> Pub. L. No. 101-121, 103 Stat. 750 (1989) (to be codified at 31 U.S.C. § 1352).

be appropriated funds.<sup>358</sup> The restrictions include disclosure and certification requirements, and civil fines of between \$10,000 and \$100,000 may be imposed for their violation. The interplay between these new restrictions and the cost principles on bid and proposal costs and direct selling expenses needs to be defined through regulations. OMB issued interim final guidance on 20 December 1989. Meanwhile, Acquisition Letter No. 89-25, 22 December 1989, provides interim guidance to Army activities.

#### *Precontract Costs*

In *OAO Corp. v. United States*<sup>359</sup> the Claims Court found an implied-in-fact contract between the Air Force and the contractor to pay for the contractor's precontract costs. The Air Force never awarded the contract for the principal effort because of a change in its requirements. During negotiations the contracting officer thought that the effort was urgently needed, so he negotiated a schedule based upon the contractor ordering long lead items immediately. Although the contracting officer's warrant was insufficient to bind the government to the entire contract, it was sufficient to obligate the government to pay a cancellation charge for the long lead items. The case illustrates that the better practice is to negotiate an advance agreement on precontract costs when an agency anticipates that a contractor will incur these costs.

In *AT&T Technologies, Inc.*<sup>360</sup> the board held that the failure to negotiate an advance agreement on precontract costs does not prevent a contractor from recovering such costs if they are otherwise allowable under the cost principles, i.e., they were incurred pursuant to negotiations, in anticipation of award, and would have been allowable if they had been incurred after award.<sup>361</sup>

#### *Delay Costs*

In *Freeman-Darling, Inc.*<sup>362</sup> the board distinguished direct impact costs from cumulative costs in allowing the contractor to recover for delay damages resulting from government changes, even though the changes did not delay the ultimate completion of the project. Those costs which were more or less the direct consequence of the changes were recoverable under the construction changes clause of the contract's Standard Form 23-A. The board denied the contractor's claim for cumulative impact costs (those resulting from an unanticipated loss of efficiency

and productivity caused by the numerous change orders that increase performance costs and extend the job) because the magnitude of the changes (by value, less than ten percent of the original contract price) did not significantly alter the contract. This important distinction should be kept in mind when negotiating complex equitable adjustment claims involving contracts that have been changed, but which are not ultimately delayed beyond their original completion dates.

#### *Compensation*

The board held in *Grumman Aerospace Corp.*<sup>363</sup> that dividends on special, non-vested, stock bonuses were allowable compensation, not unallowable dividends.

#### *Pension Costs*

Allocating Pension Costs. In *Teledyne Continental Motors, General Products Division*<sup>364</sup> the board addressed the methods of allocating pension costs under CAS 413.

Termination of Pension Plans. FAC 84-51 issued a final rule on the termination of pension plans. The rule stems from a concern that a contractor may terminate an over-funded pension plan by paying off its legal liability to the covered employees. The government, having reimbursed the contractor for much of the overpayments, is now entitled to recover an equitable share of the surplus. Advance agreements with contractors in this area are recommended.<sup>365</sup>

#### *Freedom of Information Act*

##### *Privately Produced Report Exempt as Law Enforcement Data*

The plaintiff in *ISC Group, Inc. v. Department of Defense*<sup>366</sup> sought to obtain an investigative report from the government that another contractor had prepared. The report resulted from an internal corporate investigation concerning suspected overcharging on government contracts by the contractor's subsidiary. The report was submitted to the government pursuant to a written agreement between the government and the contractor's subsidiary that promised confidentiality of the report. The government determined that the report was exempt from disclosure under the Freedom of Information Act (FOIA),<sup>367</sup> pursuant to three exemptions: 1) exemption (b)(3), because the False Claims Act<sup>368</sup> exempts from

<sup>358</sup> H.R. Rep. No. 264, 101st Cong., 1st Sess. 97 (1989).

<sup>359</sup> 17 Cl. Ct. 91 (1989).

<sup>360</sup> DOTBCA No. 2007, 89-3 BCA ¶ 22,104.

<sup>361</sup> FAR 31.205-32.

<sup>362</sup> GSBGA No. 7112, 89-2 BCA ¶ 21,882.

<sup>363</sup> ASBCA No. 24665, 90-1 BCA ¶ \_\_\_\_\_ (24 Oct. 1989).

<sup>364</sup> ASBCA No. 24758, 89-2 BCA ¶ 21,780.

<sup>365</sup> FAC 84-51, 21 August 1989.

<sup>366</sup> No. 88-0631 (D.D.C. May 5, 1989).

<sup>367</sup> 5 U.S.C. § 552.

<sup>368</sup> 31 U.S.C. § 3729(d).

disclosure investigative information voluntarily provided to the government that involves false claims; 2) exemption (b)(4), because the report contained sensitive proprietary information that was submitted to the government under an express assurance of confidentiality; and 3) exemption (b)(7), because the report was compiled for law enforcement purposes. Without addressing whether exemption (b)(3) applied, the U.S. District Court for the District of Columbia held that both exemptions (b)(4) and (b)(7) applied in this case. The court found that the information in this report was commercial or financial in nature and that it was confidential. Noting that submission of the report was not required for the contractor to do business with the government, the court held that disclosure of this contractor-prepared report would be likely to impair the government's ability to obtain such voluntarily disclosed information in the future; therefore, the report should be withheld pursuant to exemption (b)(4). Then the court determined that the report was protected under exemption (b)(7) as having been compiled for law enforcement purposes, even though it had been prepared solely by the contractor's subsidiary, because the report was prepared and submitted pursuant to an agreement with the government that clearly was intended to enforce the laws prohibiting fraud in government contracts. Thus, the court ruled that information gathered and compiled by a private entity can qualify for protection from disclosure under FOIA exemption (b)(7).

#### *Supreme Court Rules on Disclosure of Audit Data Used in Grand Jury Probe*

The Supreme Court recently reversed the Court of Appeals for the Second Circuit on the government's duty to disclose data used in a grand jury probe. The Second Circuit had decided that audit reports must be disclosed when the audit documents were prepared in routine audits and only later were transferred to a law enforcement agency, even though the information is being considered by a grand jury in an investigation for possible fraudulent activity in connection with government contracts. Rationalizing that such documents were not compiled for law enforcement purposes, which is required for FOIA exemption (b)(7) to preclude disclosure, the Second Circuit ordered the government to disclose audit information that had been compiled eight years earlier concerning the contractor's costs.<sup>369</sup> The Supreme Court reversed the Second Circuit, holding that exemption (b)(7) may be invoked to prevent disclosure of documents not originally created for law enforcement purposes, but which are later gathered in a law enforcement investigation. The Supreme Court determined that information sought under the FOIA is exempt from disclosure if it has been compiled for investigative purposes at the time the government invokes the exemption, whether or not it was originally compiled for such purposes. Thus, the Court held that the FOIA does not require the government to surrender even dated audit

information to a contractor who is under grand jury investigation for fraud.<sup>370</sup>

### *Investigations, Audits, and Subpoena Power*

#### *Access to Records*

The Newport News Shipbuilding & Drydock Company lost another battle over the scope of the Defense Contract Audit Agency's (DCAA's) subpoena power over a contractor's books and records. In *United States v. Newport News Shipbuilding & Drydock Company*<sup>371</sup> the court held that DCAA's subpoena power extended to the company's estimates and projections of future labor and materials rates and expenditures. DCAA contended that it needed access to such information to determine the accuracy, completeness, and currency of cost or pricing data on specific contracts and to corroborate estimates of total contract costs contained in reports submitted by the contractor. The contractor complained that this information was judgmental and subjective and was therefore beyond the scope of DCAA's subpoena power. The court noted that FAR 52.215-2(a) (the audit clause) expressly includes computations and projections in the list of materials that DCAA has a right to examine. Additionally, the court commented that access must also be measured against a practical understanding of the defense procurement process and sound auditing practices. Newport News had acknowledged that it routinely disclosed information in the form of estimates and projections to allow DCAA to evaluate cost or pricing data, thereby recognizing that estimates and projections are used in the defense procurement process. The court observed that sound auditing practices justify granting DCAA access to such material to enable an auditor to obtain sufficient corroborative information to satisfy him that the information on which he relies is accurate and complete.

#### *Use of the Inspector General Subpoena Power by DOJ Investigators*

In *United States v. Educational Development Network Corporation*<sup>372</sup> the Third Circuit held that rule 6(e) of the Federal Rules of Criminal Procedure, which prevents the government from sharing information with persons other than those listed on the government's notice of disclosure, does not prohibit the Department of Justice (DOJ) from participating in other federal agencies' investigations before evidence is actually presented to a grand jury. One day after the prosecutor had filed its disclosure notice, the DOD Inspector General's (IG's) office subpoenaed documents from the contractor. The DOD IG's office then made available the documents that it had obtained to the U.S. Attorney's criminal and civil investigators and to the Army's criminal investigators. The U.S. Attorney and DOD admitted that they had agreed to conduct a joint investigation and to share the evidence obtained through the IG's subpoena power.

<sup>369</sup> John Doe Corp. v. John Doe Agency, 850 F.2d 105 (2d Cir. 1989).

<sup>370</sup> John Doe Agency v. John Doe Corp., No. 88-1083 (U.S. Dec. 11, 1989) (1989 U.S. LEXIS 5837).

<sup>371</sup> No. Misc. 87-29 (E.D. Va. July 24, 1989), 52 Fed. Cont. Rep. (BNA) 258 (31 July 1989).

<sup>372</sup> 884 F.2d 737 (3d Cir. 1989).

The contractor argued that once the grand jury was impaneled and a disclosure notice filed, the U.S. Attorney was prohibited from using the IG's subpoena power to gather evidence. The court noted that rule 6(e) bars disclosure of matters occurring *before* a grand jury, but not disclosure of information obtained by DOD that is subsequently presented to a grand jury. The court also rejected the contractor's contention that the U.S. Attorney had acted in bad faith by using the IG's subpoena power rather than the grand jury process to obtain evidence to support an indictment. Finding no statute, regulation, or case law to prevent such action, the court held that the prosecutor's cooperation with the IG on the use of the latter's subpoena power was permissible.

#### *Military Criminal Investigators May Aid FBI in Conducting Searches*

The court held in *United States v. Stouder*<sup>373</sup> that the use of military criminal investigators to assist FBI agents in conducting a search of a contractor's plant did not violate the statutory ban on using the military for law enforcement purposes. The Posse Comitatus Act<sup>374</sup> makes it a crime for anyone to use the Army or Air Force to help execute federal laws, except as authorized by the Constitution or by act of Congress. Nevertheless, the court stated that the Posse Comitatus Act was not violated in this case because the military investigators were not used in a manner that regulated the conduct of the defendant. Furthermore, the court held that the use of the military investigators was authorized by the Inspector General Act of 1978<sup>375</sup> as amended by Department of Defense Authorization Act of 1982,<sup>376</sup> which authorizes the DOD Inspector General and its agents to conduct investigations of fraud offenses affecting the Department of Defense. The court also noted that the IG Act states that the Posse Comitatus Act does not apply to audits and investigations conducted by, or at the request of, the DOD Inspector General.

#### *Attorney General's Civil Investigative Demand Not Affected by Qui Tam Filing*

The filing of a *qui tam* complaint under the False Claims Act<sup>377</sup> does not bar the Attorney General's issuance of a civil investigative demand to the defendant of the *qui tam* action. The District of Columbia Court of Appeals held in *Avco Corporation v. Department of Justice*<sup>378</sup> that 31 U.S.C. § 3733 authorizes the Attorney General to issue a criminal investigative demand whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claim investigation. The criminal investigative demand

requires the person to produce that evidence. The contractor employee who filed the *qui tam* action contended that the filing of the complaint had cut off the Attorney General's power to issue a criminal investigative demand, and the government was therefore unlawfully conducting civil discovery in the pending action through *ex parte* investigative demands. Finding nothing in the wording of section 3733 or its legislative history to support the employee's position, the court held for the government.

#### *Foreign Law Not a Bar to Audit of Records or Discovery*

In *Aerospatiale Helicopter Corporation*<sup>379</sup> the board held that the government had the right to audit records of a French subcontractor, and that a French statute that prohibits the release of certain types of documents for use in judicial or administrative proceedings outside of France did not excuse the subcontractor from making its records available to the prime contractor, its United States subsidiary. The contractor contended that the government's audit rights and the board's discovery rules did not apply to the subcontractor because the subcontractor was not a party to the litigation. The board noted that a substantial portion of the contractor's claim was based upon costs incurred by the subcontractor and that the contractor's evidence would have to be based upon the subcontractor's records of those costs. As a party to the action, the contractor had the obligation under the contract's audit clause and the board's discovery rules to produce the records upon which its claim was based for inspection and auditing. The board also held that the French "blocking" statute did not diminish the government's audit or discovery rights. It concluded that the French statute would not in fact preclude the subcontractor from producing records in litigation outside of France when to do so would be in a firm's best interests. Furthermore, based upon prior cases, the board observed that waivers may be requested and are frequently granted from the statute's prohibitions. Therefore, the board ordered the contractor to produce its subcontractor's records if the appeals were to continue.

#### *Contract Payment and Collection Procedures*

##### *Progress Payments*

In *DeKonty Corporation*<sup>380</sup> the ASBCA held that the government's withholding of progress payments in excess of the construction contract's ten percent maximum

<sup>373</sup> 724 F. Supp. 951 (M.D. Ga. 1989).

<sup>374</sup> 18 U.S.C. § 1835.

<sup>375</sup> Pub. L. No. 95-452, 92 Stat. 1101 (1978).

<sup>376</sup> Pub. L. No. 97-252, § 1117, 96 Stat. 750 (1982).

<sup>377</sup> 31 U.S.C. §§ 3729-3733.

<sup>378</sup> 884 F.2d 621 (D.C. Cir. 1989).

<sup>379</sup> DOTBCA Nos. 1905 *et al.*, 89-1 BCA ¶ 21,559.

<sup>380</sup> ASBCA No. 32140, 89-2 BCA ¶ 21,586.

limitation in its payments clause<sup>381</sup> for contingent claims based upon potential events constituted a material breach of the contract. The government's retention had exceeded by \$1,926 the ten percent limitation. The board also found that the government's nonpayment of an undisputed amount (\$9,904) was a material breach. The board stated that the nonpayment would justify the contractor's stopping performance without regard to whether or not the nonpayment caused it to be financially unable to perform. For a contrary determination, however, see *Skipper & Company*,<sup>382</sup> wherein the board stated that upon a default termination, the government has an independent ground aside from the payment clause to withhold any reasonable amounts pending completion of the work, determination of government damages, and surety claims for indemnification.

#### *The Prompt Payment Act Amendments of 1988*

The Prompt Payment Act Amendments of 1988<sup>383</sup> significantly changed the payment practices of the Federal Government.<sup>384</sup> FAC 84-45 amended FAR subpart 32.9 to implement the 1988 Amendments, which were effective for contracts awarded, renewed, and options exercised after 31 March 1989.<sup>385</sup> FAC 84-45 amended the geographic coverage of FAR subpart 32.9 and made the provisions apply to all government contracts, including small purchases, except for contracts where payment terms and late payment penalties have been established by other governmental authority (e.g., tariffs). FAC 84-45 limits the applicability of the interest penalty provisions to contracts awarded to foreign vendors for work performed outside the United States. Other significant changes to FAR subpart 32.9 include: 1) elimination of the fifteen-day interest penalty payment grace period, thereby making the interest penalty accrue from the day after the payment date; 2) establishment of more specific criteria for when an agency has received an invoice from the contractor; 3) reduction from fifteen days to seven days the time available for an agency to return a defective invoice or progress payment request to a contractor; 4) creation of an additional penalty for late interest penalty payments (effective for contracts awarded after 1 October 1989); 5) creation of interest penalties for late progress payments and late payments of retained amounts in construction contracts and A&E contracts; and 6) a requirement on prime contractors in construction contracts to pay their subcontractors within

seven days from when the government pays the prime and to require the prime to include a similar payment clause in its contracts with its subcontractors (this requirement flows down to all lower tier subcontractors).

#### *Revision to Circular No. A-125, "Prompt Payment"*

The final version of OMB Circular No. A-125, "Prompt Payment," has been issued to implement changes made by the Prompt Payment Act Amendments of 1988<sup>386</sup> and to clarify and reorganize existing provisions of the circular.<sup>387</sup> Interestingly, the circular is silent on the geographic coverage of the "Prompt Payment" provisions. This means that the amended geographic coverage contained in FAC 84-45 will not have to be changed. Among other changes, the circular sets the additional interest penalty at 100% of the original late payment interest penalty beginning 22 January 1990 and includes provisions for assessing interest against a contractor for receipt of unearned progress payments in construction contracts.

#### *Claim Requirement Under the Prompt Payment Act*

In *Toombs and Company, Inc.*,<sup>388</sup> the issue was whether the appellant's claim letters to the contracting officer were sufficient to constitute Contract Disputes Act (CDA) claims for interest penalties pursuant to the Prompt Payment Act (PPA).<sup>389</sup> The appellant submitted claims for interest on delayed progress payments under a construction contract. The board did not decide whether the appellant was entitled to recover any amount, but it did hold that the appellant's letters were sufficient to constitute CDA claims. The board held that the claim letters were presented in sufficient detail to notify the contracting officer of the basic factual allegations upon which the claims were premised and that the claim letters provided the basic factual allegations necessary for the contracting officer to make an informed decision. The board clearly stated that the interest penalty accrues on a late payment without submission of a claim, but to collect an interest penalty the contractor must file a claim pursuant to the CDA, as provided in section 3906(a) (now section 3907(a)) of the PPA.

#### *Government Property*

In *Hart's Food Service, Inc., d/b/a Delta Food Service*<sup>390</sup> the contract did not set forth in full text or incorporate by reference the standard government prop-

<sup>381</sup> See, e.g., FAR 232.5(e).

<sup>382</sup> ASBCA No. 30327, 89-1 BCA ¶ 21,940.

<sup>383</sup> Pub. L. No. 100-496, 102 Stat. 2455 (1988).

<sup>384</sup> See McCann, Norsworthy, Ackley, Aguirre, Mellies, and Munns, *Recent Developments in Contract Law-1988 in Review*, The Army Lawyer, Feb. 1989, at 5, 11; Mellies, *The Prompt Payment Act Amendments of 1988*, The Army Lawyer, Jan. 1989, at 49.

<sup>385</sup> FAC 84-45, 31 March 1989.

<sup>386</sup> Pub. L. No. 100-496, 102 Stat. 2455 (1988).

<sup>387</sup> 54 Fed. Reg. 52,700 (1989).

<sup>388</sup> ASBCA Nos. 35085, 35086, 89-1 BCA ¶ 21,402.

<sup>389</sup> 31 U.S.C. §§ 3901-3906.

<sup>390</sup> ASBCA Nos. 30756, 30757, 89-2 BCA ¶ 21,789.

erty (fixed price) clause. Citing *G. L. Christian & Associates v. United States*,<sup>391</sup> the board held that because DAR 7-104.24(a) mandated the clause for any contract in which the government furnishes property to the contractor or in which the contractor is required to acquire government property, the clause was deemed to be included by operation of law.

### *Government Contractor Defense*

#### *General*

The government contractor defense continues to be a source of litigation. Last year, in *Boyle v. United Technologies Corporation*<sup>392</sup> the Supreme Court held that contractors of military equipment are not liable under state laws for design defects if: 1) the government approved reasonably precise design specifications; 2) the equipment conformed to those specifications; and 3) the supplier warned the government about the dangers in the use of the equipment that were known to the supplier but not to the government.

#### *Contractor Responsibility for Design, But Not Construction*

*Trevino v. General Dynamics Corporation*<sup>393</sup> involved a contractor that was responsible for the design, but not the construction, of the defective equipment. The case arose from modifications to an existing submarine. The Navy established the basic design for the changes and then awarded a contract to General Dynamics to perform the necessary technical research and to produce working drawings for a diving chamber. Government employees completed the modifications. Five Navy divers died as a result of, among other causes, four design deficiencies. The Fifth Circuit held that the Navy's "mere rubber stamp" approval of the contractor's drawings did not meet the government approval element of *Boyle*. A government employee had signed each drawing to signify approval. The contractor contended that the Navy's construction of the diving chamber with knowledge of its defects and its use of the chamber for thirteen years without changing the design constituted government approval. The Fifth Circuit, however, stated that when the government delegates its design discretion to the contractor or allows the contractor to develop the design, the government "has not approved reasonably precise specifications" unless the government's approval was based upon a substantive review and evaluation of the contractor's design choices. Concluding that the government never approved reasonably precise specifications, the Fifth Circuit held that the contractor was not entitled to use the government contractor defense. On 30 October 1989, the U.S. Supreme Court denied General Dynamics's request to review the Fifth Circuit's decision.

### *Government Approval of Reasonably Precise Specifications*

In *MaGuire v. Hughes Aircraft*<sup>394</sup> the district court took a contrary position on what constituted government approval of reasonably precise specifications. The plaintiff contended that there was no evidence of government involvement in the decision to change the bearings that failed in the helicopter engine. The court stated, however, that it was not necessary to show continuous, back and forth discussions regarding the inclusion or exclusion of the specific design deficiency alleged in the case. Instead, it was sufficient to show that the government approved the overall design. The court found that after an extensive design process, the military made a knowing decision to use a bearing with a certain statistical failure rate.

In another case, *Smith v. Xerox Corporation*,<sup>395</sup> the Fifth Circuit held that when the government provided the relevant environmental specifications it wanted the product to meet and incorporated these standards in the production contract the government had approved reasonably precise specifications. The court also noted that the contractor employee's testimony that the government had reviewed and approved the contractor's design specifications was un rebutted.

#### *Defects in Design Versus Manufacture*

In *Hardwivel v. General Dynamics*<sup>396</sup> the Eleventh Circuit held that a defect that is inherent in a military system is a defect in the design and not in the manufacture of the system. In this case, wire chaffing, the rubbing of wires in the electrical system against other wires or structural parts of the aircraft leading to an electrical failure, allegedly caused the crash of an F-16 aircraft. The court found that wire contact with protruding screws was a common occurrence and that protruding screws were a normal condition in the aircraft and did not indicate improper installation. In applying the *Boyle* factors, the court held that the wire chaffing was a defect inherent in the product that the government approved, that the aircraft's wiring system conformed to the specifications, and that the contractor had warned the government about the dangers of wire chaffing. Concluding that the government contractor defense factors were met, the Eleventh Circuit reversed the lower court's decision and held for the contractor.

#### *Act of State Doctrine*

On 26 June 1989 the United States Supreme Court agreed to review a Third Circuit decision that the act of state doctrine did not bar an unsuccessful bidder's antitrust and racketeering claims against a competitor that allegedly paid a kickback to the Nigerian govern-

<sup>391</sup> 160 Ct. Cl. 1, 312 F.2d 418, *reh'g denied*, 160 Ct. Cl. 58, 320 F.2d 345, *cert. denied*, 375 U.S. 954 (1963).

<sup>392</sup> 108 S. Ct. 2510 (1988).

<sup>393</sup> 876 F.2d 1154 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 327 (1989).

<sup>394</sup> No. 87-4706, slip op. (D.C. N.J. Nov. 8, 1989).

<sup>395</sup> 866 F.2d 135 (5th Cir. 1989).

<sup>396</sup> 878 F.2d 1311 (11th Cir. 1989).

ment to win a contract.<sup>397</sup> The unsuccessful bidder alleged that the competitor paid commissions to officials of the Nigerian government to get the contract. The Third Circuit had ruled that the suit would not interfere with the conduct of foreign policy. Although the Third Circuit ruled on other issues, the Supreme Court will

limit its review to whether the act of state doctrine would bar a judicial determination of whether the government of Nigeria acted illegally in performing an act of state and whether such a determination would *prima facie* have an impact on foreign relations.

<sup>397</sup> *W. S. Kirkpatrick & Company v. Environmental Tectonics Corporation International*, 847 F.2d 1052 (3d Cir. 1988), *cert. granted*, 109 S. Ct. 3213 (1989).

## USALSA Report

### *United States Army Legal Services Agency* *The Advocate for Military Defense Counsel* **DAD Notes**

#### **Invocation and Subsequent Interrogation**

Consider this factual situation. Multiple suspects are apprehended and questioned by agents of the Army Criminal Investigation Command (CID). Upon invoking their right to counsel, all questioning ceases and they are immediately referred to the local trial defense service (TDS) field office. The resident defense attorney counsels one of the soldiers and explains to the others that they will be provided with an attorney at some future point. Eleven days after the initial invocation, an agent, pursuant to regulatory procedures promulgated by CID, summons one of the suspects for a "face-to-face" interview to "find out who his attorney is." The suspect states that he has not seen an attorney but is willing to discuss the offenses. A rights waiver form<sup>1</sup> is properly completed and the suspect confesses.

The Army Court of Military Review recently addressed this scenario and held that a rights waiver obtained under these circumstances was invalid.<sup>2</sup> In so doing, the court declined to follow its earlier decision in *United States v. Whitehouse*,<sup>3</sup> in which the court held that a valid waiver of a previously invoked right to counsel could be established by proof that an accused

had been afforded the opportunity to consult with counsel. This was called the "break-in-custody" rule.

The Army court explained in *Granda* that the decision in *Whitehouse* was the product of confusion over the meaning of *Edwards v. Arizona*.<sup>4</sup> Subsequent decisions by the Supreme Court have invalidated the interpretation that underpinned the *Whitehouse* decision, and the rule is now articulated as follows: "[A] preindictment suspect who, while being interrogated, asserts his Fifth Amendment right to counsel . . . may not be questioned again unless he initiates the meeting."<sup>5</sup>

The court in *Granda* did not decide whether *Edwards* is violated when police initiate confrontations intending neither to re-interrogate nor secure a "waiver" of a previously invoked right to counsel.<sup>6</sup> In *Granda* the court focused on the agent's actual motivation and knowledge.

In determining the waiver to be invalid, the Army court referred to an admission by the CID agent that his motivation in arranging the "face-to-face" interview was not only to determine whether the suspect had consulted with counsel, but also to re-interrogate the suspect. The

<sup>1</sup> Dep't of Army, Form 3881, Rights Warning Procedure/Waiver Certificate (May 1981).

<sup>2</sup> *United States v. Granda*, ACMR 8801488 (A.C.M.R. 31 Oct. 1989).

<sup>3</sup> 14 M.J. 643 (A.C.M.R. 1982).

<sup>4</sup> 451 U.S. 477 (1981). In *Edwards* the Supreme Court created a bright-line per se test for determining the validity of a purported waiver of the fifth amendment right to counsel once it has been invoked. "[I]f the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police and (b) knowingly and intelligently waived the right he had invoked." 469 U.S. at 94-95 (citations omitted).

<sup>5</sup> *Granda*, slip op. at 10 (citing *Patterson v. Illinois*, 108 S. Ct. 2389, 2394 (1988); *Moran v. Burbine*, 475 U.S. 412, 423 n.1 (1986); *United States v. Fassler*, 29 M.J. 193 (C.M.A. 1989)).

<sup>6</sup> *Granda*, slip op. at 12. *But see* *United States v. Brabant*, 29 M.J. 259, 263 (C.M.A. 1989) (acting commander's actions, in ordering accused to meet with commander after he had already invoked right to remain silent and before he could consult attorney, were functional equivalent of reinitiation of interrogation, notwithstanding that commander's purpose was only to advise accused of rights). The court in *Granda* did not decide whether a "break-in-custody" rule would apply to the accused's case because the re-interrogation of the accused was a result of "bad faith" on the part of the investigating agent and the accused had been denied the opportunity to consult with counsel. *See Granda*, slip op. at 10-12. *See also* *Dunkins v. Thigpen*, 854 F.2d 394 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 1329 (1989) (a break in custody after the invocation of fifth amendment rights where the defendant has a reasonable opportunity to consult with counsel ends need for excluding any subsequent statement under *Edwards*).

Army Court of Military Review viewed this purpose, together with the agent's actual knowledge that defense counsel were not readily available on post to provide representation to all of the individuals who had invoked their right to counsel, as indicative of bad faith on the part of the agent. The court found that the actions of the agent were calculated to produce an incriminating response and were therefore impermissible, even though they were conducted pursuant to authorized procedures.<sup>7</sup>

Although *Granda* rejected the *Whitehouse* holding that *Edwards* requires only "that the accused must be provided a reasonable opportunity to consult with counsel,"<sup>8</sup> the court refrained from deciding whether a "break-in-custody" rule might, at some point, be recognized in military law.<sup>9</sup> Given the proscriptive language of Military Rule of Evidence 305(d)(2),<sup>10</sup> the court questioned whether there can ever be an "availability of counsel" exception where the police initiate the subsequent interrogation without counsel being present.<sup>11</sup>

The court in *Granda* did consider the accused's inability to secure counsel as an additional ground for ruling the waiver invalid. The court noted that "the record does not establish that the appellant did not seek assistance of counsel or refute the possibility that he was discouraged from doing so by the futile experiences of others at the [TDS branch office]."<sup>12</sup>

Defense counsel should be aware of this additional area of inquiry and should develop the record when it appears that an accused, who was released and later re-interrogated, was unable to secure counsel immediately. Counsel should look beyond the length of time available to a suspect during which he or she was free to seek counsel. It is important that counsel examine not only the suspect's actions or inaction during that time, but also the reasons behind them.

Defense counsel seeking relief under *Granda* should create a complete record at trial by inquiring into the agent's true motives for arranging the second interview. Aside from the obvious method of simply asking the agent what he hoped to accomplish during the interview, defense counsel should develop the facts about the

second encounter. For example, did the agent schedule only the few minutes necessary to comply with the avowed purpose of the interview, or did he set aside a significant amount of time? What was said when the appointment was arranged with the soldier's unit? What was the status of the investigation at the time? Defense counsel should establish the extent to which the agent prepared questions for the second interview or discussed it with his supervisor. Was the setting for the interview carefully controlled as it would be for an interrogation? By eliciting these objective indicators, defense counsel can go a long way towards establishing that, self-serving assertions by the agent notwithstanding, the actual purpose of the interview was to elicit incriminating responses. Because the Army court also noted the agent's actual awareness that additional defense counsel were not readily available, defense counsel may also wish to develop the record with respect to the particular aspects of TDS support in their jurisdiction and the agent's awareness of those aspects.

Defense counsel should also note that, although the court in *Granda* found it unnecessary to review the propriety of the CID regulatory procedures requiring "face-to-face" questioning in the abstract, the court opined: "Although the Government represents this procedure as constitutionally innocuous, this requirement obviously treads perilously close to the precipice of police 'badgering,' the very focus of the *Edwards* rule."<sup>13</sup>

In characterizing this procedure as "suspect," the court noted that every soldier undergoing custodial interrogation is entitled to military counsel upon request.<sup>14</sup> Significantly, the court acknowledged that Military Rule of Evidence 305(g)(2) purports to authorize continued interrogation of an individual who is represented by counsel when efforts to notify counsel are unavailing or when counsel does not attend an interrogation scheduled within a reasonable period of time after notice was given. Nevertheless, the court warned that *Michigan v. Jackson*,<sup>15</sup> a Supreme Court case, is strong precedent to the contrary. Therefore, in the court's view, the most effective procedure for determining whether a soldier has seen counsel and the identity of that counsel

<sup>7</sup> *Granda*, slip op. at 12. Cf. *United States v. Lee*, 25 M.J. 457, 461 (C.M.A., 1988) ("a legitimate administrative inquiry may not lawfully be exploited to subvert the constitutional or statutory rights of a person suspected of a crime").

<sup>8</sup> *Whitehouse*, 14 M.J. at 645.

<sup>9</sup> *Granda*, slip op. at 11.

<sup>10</sup> Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 305(d)(2) [hereinafter Mil. R. Evid.].

<sup>11</sup> Mil. R. Evid. 305(d)(2) provides that when a person entitled to counsel under this rule requests counsel, a judge advocate or an individual certified in accordance with article 27(b) shall be provided by the United States at no expense to the person and without regard to the person's indigency or lack thereof before the interrogation may proceed. In addition to counsel supplied by the United States, the person may retain civilian counsel at no expense to the United States. Unless otherwise provided by regulations of the Secretary concerned, an accused or suspect does not have a right under this rule to have military counsel of his or her own selection.

<sup>12</sup> *Granda*, slip op. at 13.

<sup>13</sup> *Granda*, slip op. at 11-12 (citation omitted).

<sup>14</sup> See Mil. R. Evid. 305(d).

<sup>15</sup> 475 U.S. 625, 635 (1986) (written waivers are insufficient to justify police-initiated interrogations after the request for counsel in a fifth amendment analysis).

would seem to be "a simple telephone call to the Trial Defense Service."<sup>16</sup> In attempting to establish that the CID "face-to-face" procedure is "badgering" under *Edwards* and is not the most effective procedure for obtaining the desired information, defense counsel should include an examination of the actual mechanics involved in arranging for the suspect's presence at CID. This examination should include actual distances, travel times, and the inconveniences involved. The process involved in arranging the interview at CID can be contrasted with the ready accessibility of the TDS office.

Defense counsel may wish to provide military law enforcement officials information on attorney representation of soldiers within the jurisdiction.<sup>17</sup> Counsel may also want to include a statement reiterating and outlining their eagerness to assist in this regard. This statement could include a roster of defense counsel available to law enforcement officials after duty hours.<sup>18</sup> Counsel should bear in mind that the ultimate goal is to ensure responsive legal service to soldiers. When law enforcement agents take steps to arrange for the interview of a suspect "to ascertain whether he has seen counsel and the identity of that counsel," TDS is indeed "a simple telephone call" away. Captain Robert C. Wee.

#### Caution: Conciliatory Objections May Cause Waiver

Military Rule of Evidence 103a<sup>19</sup> requires that counsel make timely and sufficiently specific objections during the course of a trial in order to preserve the issue for appellate review. Absent plain error, evidentiary issues that were either not objected to at trial or objected to incorrectly will be considered waived.<sup>20</sup> The Army Court of Military Review recently indicated how far it will go to strictly apply the waiver rule.

In *United States v. Rivera-Cintron*<sup>21</sup> the accused was charged and convicted of one specification of wrongful distribution of cocaine. On appeal, he contended that the evidence was insufficient to support a finding of guilty and that the military judge erred in admitting a plastic baggie containing a white powdery substance purported to be cocaine. With respect to the second issue, the government presented evidence through a registered source (PVT B) and members of the Fort Riley Drug Suppression Team (DST) that the accused sold .461 grams of cocaine to PVT B in a "controlled buy."

Government evidence indicated that PVT B met the accused,<sup>22</sup> entered an automobile, went for a short

drive, and returned under the observation of DST agents. Private B then returned to a waiting DST vehicle and handed an agent the plastic baggie that he claimed he received from the accused.

According to PVT B, the plastic baggie contained a rock type substance with a yellowish tint. He never acknowledged that the white powdery substance contained in the proffered prosecution exhibit was the same substance that he gave to the DST agent. The DST agent was recalled, and he also claimed to remember that the substance he received from PVT B was in a rock form. On cross-examination, he admitted that the substance had a yellowish tint. He noted that there was some powder residue, but he could not explain why he described the item tested as an "off-white powder" in his report.

The civilian defense counsel then objected to the admission of both the bag containing the white powdery substance and the report of the field test results. Subsequently, the civilian defense counsel made the following comment noted by the Army court:

Our objection [to the exhibits] are foundational in nature, not to the chain of custody, *per se*. I would even admit that [trial counsel] has made that chain of custody.

....

... our objection is to the fact whether or not there has been a properly layed [sic] foundation for the admission of that evidence. I probably would say that realistically that might be a weight more than admissibility question.<sup>23</sup>

The military judge agreed that it was "a weight question as opposed to an admissibility question" and allowed both exhibits into evidence.

On appeal, the Army court reiterated the requirement for specific objections and found that the appellant waived the issue in view of:

civilian defense counsel's withdrawal of any objection as to admissibility of the evidence at trial, counsel's disinclination to raise further any chain of custody question by calling for such persons as the laboratory technician or the evidence custodian, and his final argument which urged the panel to find

<sup>16</sup> *Granda*, slip op. at 12.

<sup>17</sup> Obviously, such information should be provided only when it would not be a violation of applicable disciplinary rules. See, e.g., Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers, Rule 1.6 (31 Dec. 1987).

<sup>18</sup> Such duty rosters are already a fairly common practice in TDS field offices.

<sup>19</sup> Mil. R. Evid. 103(a).

<sup>20</sup> Mil. R. Evid. 103(a) and (d).

<sup>21</sup> 29 M.J. 757 (A.C.M.R. 1989).

<sup>22</sup> The accused's main defense was mistaken identification. Eyewitness testimony of PVT B and two DST agents tied the accused to the scene, but both DST agents thought the accused was wearing cooks' whites. Private B did not remember what he was wearing. The accused, whose normal duty uniform was the battle dress uniform, was not a cook and would not have worn cooks' whites in a duty situation.

<sup>23</sup> *Rivera-Cintron*, 29 M.J. at 759.

reasonable doubt based on mistake as to the identity of the cocaine . . . .<sup>24</sup>

Both PVT B and the DST agent testified that they received a rock form substance with a yellowish tint. The DST agent took a field test of an off-white powder substance. No explanation was provided for the discrepancy. At trial, the same white powdery substance was offered into evidence to show that what the accused sold to PVT B was cocaine. Yet, the misguided and conciliatory explanation by the civilian defense counsel of his objection was considered by the Army court to be a withdrawal of his objection, therefore waiving any error on appeal.<sup>25</sup>

This case is indicative of the fact that waiver provisions on evidentiary issues will be strictly enforced by the Army Court of Military Review. It also shows how important it is to maintain an objection on the record without making unrequested concessions or conciliatory statements that could be construed on appeal as a withdrawal of that objection. CPT Alan M. Boyd.

### Shoring Up Against Spillover

Spillover is a due process concern. It arises when the accused faces more than one charge and the strength of the government's case differs for each charge. The danger is that a factfinder will convict the accused of a weak charge on the basis of evidence that, but for the existence of other stronger charges, might not sustain a conviction. The convincing effect of evidence on the stronger charge spills over to wash out reasonable doubt with respect to the weaker charge. Had the one charge been tried alone, the factfinder might have acquitted the accused.

In *United States v. Hogan* the Court of Military Appeals reversed a rape conviction because of the spillover effect from a second rape charge. The court stated that, had the judge instructed the panel "to keep the evidence of the two offenses separate during their deliberations," the conviction might have stood.<sup>26</sup> More recently, in *United States v. Hays* the court held that such an instruction is insufficient protection in a case "where the criminal intent involved in two offenses is similar . . . [but] . . . proof of one would not be admissible to prove the other."<sup>27</sup> In such circumstances, the court recognized "a serious danger that overwhelming proof on one [offense] will 'spill over' and prejudice a legitimate defense to another."<sup>28</sup>

The court suggested two additional remedies: special findings or a motion to sever the similar offenses.<sup>29</sup> The remedy of special findings presents an opportunity to inquire into a panel's deliberative process because the factfinder "would have to articulate exactly what evidence it relied upon as to each offense."<sup>30</sup> The court's reference to a severance motion may have breathed life into what had previously been a dead remedy in the military.<sup>31</sup> In multiple-offense cases, counsel should evaluate the danger that solid proof on one charge may improperly convict the client of an offense for which the government's proof is weak. The Court of Military Appeals has suggested a couple of tools counsel can use to compartmentalize the factfinder's consideration of the government's case. Counsel, of course, are free to fashion other tools to shore up the channels through which the government's case can legitimately flow.<sup>32</sup> CPT Brian D. Bailey.

<sup>24</sup> *Id.*

<sup>25</sup> The court found no prejudice in any event, holding that the identity of the drug was proven by the testimony of PVT B, who "indicated no uncertainty at all" that he had purchased cocaine from the appellant. *Id.* at 760. The court stated: "It is well established that the identity of a drug may be proven by the testimony of a witness who, though not an expert in the technical sense, has established a familiarity with the substance." *Id.* (citing *United States v. Evans*, 16 M.J. 951 (A.F.C.M.R. 1983)).

<sup>26</sup> 20 M.J. 71, 73 (C.M.A. 1985). Dep't of Army, Pam. 27-9, Military Judges' Benchbook (1 May 1982), apparently does not have such an instruction. The closest one is at paragraph 7-13, "Other Offenses or Acts of Misconduct by Accused."

<sup>27</sup> 29 M.J. 213, 215 (C.M.A. 1989). The instruction in *Hays* states, "Each offense charged must stand on its own. Proof of one offense carries with it no inference that an accused is guilty of another offense." 29 M.J. at 214 n.\*.

<sup>28</sup> 29 M.J. at 215.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* The remedy of special findings presents some interesting procedural questions. Should the judge present the panel with a list of evidence from which the panel selects the bases for its findings, or should the panel be free to come up with the evidence on its own? How is the panel to account for members who may have relied on different evidence to reach the same finding? More fundamentally, if the court cannot rely on a member's ability to follow the judge's instructions as to what the member can consider, how can the court expect the member to accurately assess and honestly relate what the member relied on to reach a finding?

<sup>31</sup> *Id.*; See generally Manual for Courts-Martial, United States, 1984, Rules for Courts-Martial 905(b)(5), 906(b)(10) [hereinafter R.C.M.]. A motion for severance may be appropriate particularly in situations where the accused takes the stand, but chooses to testify only with regard to the weaker offense. Cf. *United States v. Castillo*, 29 M.J. 145, 152 n.6 (C.M.A. 1989) (quoting S. Saltzburg, L. Schinasi & D. Schlueter, Military Rules of Evidence Manual 93-94 (2d ed. 1986)).

<sup>32</sup> For example, closing argument is a prime time to clarify what evidence the panel can properly consider on a given offense and to encourage the panel to apply the reasonable-doubt standard only in light of that evidence. Also, short of severing the offenses, counsel may convince the judge to bifurcate the findings process in accordance with his authority under R.C.M. 801(a)(3), thereby forcing the government to present its weakest charge first and having the panel reach findings thereon before it considers the stronger case. A basis for using any of these methods is Military Rule of Evidence 404(b), which states, "Evidence of other crimes . . . is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." MCM, 1984. This rule applies regardless of whether the "other crime" is a charged offense.

**Military Rules of Evidence 301(e), 404(b), and 611(b)  
and the Accused's Right to Invoke the Fifth Amendment  
on the Stand**

Military Rule of Evidence 301(e)<sup>33</sup> provides that "when an accused testifies voluntarily as a witness, the accused thereby waives the privilege against self-incrimination with respect to the matters concerning which he or she so testifies." If evidence of prior uncharged misconduct is admissible at a court-martial under Military Rule of Evidence 404(b), it is arguably "relevant" to the charged offense. Can an accused who takes the stand therefore be forced to answer cross-examination concerning the uncharged offense, or can he invoke his privilege against self-incrimination? In *United States v. Castillo*<sup>34</sup> the Court of Military Appeals reconciled Military Rules of Evidence 404(b), 301(e), and 611(b) to hold that an accused who testifies on direct examination about a charged offense may refuse to answer cross-examination regarding uncharged misconduct at an entirely different place and time. Nevertheless, if the evidence of uncharged misconduct is admissible under Military Rule of Evidence 404(b), the accused's testimony may be stricken from the record upon motion.

Castillo was charged with, among other things, soliciting his step-daughter, Lisa, to commit sodomy. Lisa testified that Castillo came to her apartment one day when she was seventeen years old. She stated that during his visit "he was like motioning for me to, you know, to come in and give him a blow job. He wanted — just motioned, pointed down, you know." She further explained that she knew his motioning meant he wanted her to perform fellatio on him because "that was all he really asked from me since I was 4."<sup>35</sup>

Defense counsel objected on the grounds that the testimony was inadmissible evidence of uncharged misconduct because it did not fit one of the purposes under Military Rule of Evidence 404(b). The military judge overruled the objection, and Lisa explained that Castillo had asked her to perform fellatio on him since she was four years old. Therefore, when he motioned down towards his pants, she knew what he meant and that he was serious.<sup>36</sup>

Testifying on his behalf, Castillo denied doing anything to solicit Lisa to perform a sexual act with him. On cross-examination, trial counsel asked, "Are you denying that you ever committed any sexual acts with

your daughter . . . ?" Castillo then invoked his privilege against self-incrimination. The military judge ruled, however, that an accused waives his right to invoke the fifth amendment by taking the stand, and the judge required Castillo to answer the trial counsel's questions. Castillo then admitted that he had had sexual contact with Lisa in the past, but he denied ever having committed sodomy with her.<sup>37</sup>

The Court of Military Appeals first addressed the question of whether the military judge erred in admitting, over defense objection, Lisa's testimony concerning her prior sexual contact with Castillo. After tracing the history of Military Rule of Evidence 404(b) from the 1951 Manual for Courts-Martial through the Drafters' Analysis of Military Rule of Evidence 404(b) in the 1984 Manual for Courts-Martial, the court stated that Military Rule of Evidence 404(b) provides examples of admissible evidence, not an exclusive list. The sole test for admissibility under Military Rule of Evidence 404(b) is "whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to crime and thereby to suggest that the factfinder infer that he is guilty, as charged, because he is predisposed to commit similar offenses."<sup>38</sup> Therefore, Lisa's testimony was admissible because it described a course of dealing between her and Castillo that the factfinder needed to know in order to understand her testimony regarding the charged offense.<sup>39</sup>

The court focused its analysis of Military Rule of Evidence 301(e) on the interpretation of the phrase "with respect to the matters concerning which he or she so testifies." The court speculated that Military Rule of Evidence 301(e) could be interpreted to mean that an accused waives his right to self-incrimination with regard to uncharged misconduct if the uncharged misconduct is relevant to the offenses about which appellant has testified. Therefore, uncharged misconduct would be a proper subject of cross-examination if extrinsic evidence of the misconduct were admissible under Military Rule of Evidence 404(b).<sup>40</sup>

On the other hand, the drafters may have intended that cross-examination of an accused be limited by Military Rule of Evidence 611(b). Military Rule of Evidence 611(b) provides that "cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." Viewed in that light, "it seems doubtful that uncharged

<sup>33</sup> Mil. R. Evid. 301(e).

<sup>34</sup> 29 M.J. 145 (C.M.A. 1989).

<sup>35</sup> *Id.* at 148.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 149.

<sup>38</sup> *Id.* at 150.

<sup>39</sup> *Id.* at 151. The court also found that the evidence was admissible under Mil. R. Evid. 403. The court stated that evidence is admissible under Mil. R. Evid. 403 if it "is indispensable for a full understanding by the factfinder of the transaction which has given rise to the criminal charge." In view of the significance of Lisa's testimony about prior sexual encounters with Castillo, the court held that Lisa's testimony was not *unfairly* prejudicial. *Id.*

<sup>40</sup> *Id.* at 152.

misconduct occurring several years before an alleged offense about which an accused has testified would be within the 'subject matter' of his testimony for purposes of Military Rule of Evidence 611(b)."<sup>41</sup>

Given the ambiguity in the two rules, it may not be clear that an accused, by taking the stand, waives his privilege against self-incrimination not only as to the charged offense, but also to an offense committed at an entirely different place and time. In order to avoid inadvertent waivers, the court held that an accused taking the stand does not waive his privilege against self-incrimination with regard to uncharged misconduct committed at a different time and place, even if evidence of that uncharged misconduct were admissible pursuant to Military Rule of Evidence 404(b).<sup>42</sup>

The court also held that, pursuant to Military Rule of Evidence 301(f)(2), Castillo's direct testimony could be stricken from the record if he refused to answer cross-examination concerning the uncharged misconduct.<sup>43</sup> The court noted that cross-examination as to other misconduct, which is done solely for the purposes of impeachment, is purely collateral for purposes of Military Rule of Evidence 301(f)(2). Therefore, an accused can invoke his privilege against self-incrimination with respect to such cross-examination and will not be subject to the sanction of having his testimony stricken. The court distinguished this from evidence of misconduct that is admissible under Military Rule of Evidence 404(b). Cross-examination about this misconduct is not purely collateral. Therefore, an accused who invokes his privilege as to this cross-examination cannot be forced to answer, but he may have his entire testimony as to the relevant charge stricken.<sup>44</sup>

Castillo made it clear that an accused who takes the stand may be required to answer only questions dealing with the particular offense about which he has testified. Castillo protects an accused who takes the stand from being subjected to damaging cross-examination about prior uncharged misconduct. The risk is that all of the accused's testimony may be lost if trial counsel moves to have the testimony stricken. Nevertheless, trial defense counsel must be aware of the limits of permissible cross-examination so they may evaluate the risk of putting their clients on the stand. CPT Patricia D. White.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 153. The court noted that the statute of limitations might have run as to the prior misconduct. If that were the case, Castillo could have been ordered to testify as to the uncharged misconduct. See Mil. R. Evid. 301(c). The government, however, would have to first establish that prosecution was barred under the Uniform Code of Military Justice and any other applicable federal or state penal statutes. *Id.* at 153-54.

<sup>43</sup> *Id.* at 154. Military Rule of Evidence 301(f)(2) provides the direct testimony of a witness invoking the fifth amendment may be stricken upon motion "unless the matters to which the witness refuses to testify are purely collateral."

<sup>44</sup> *Id.*

### *Contract Appeals Division—Trial Note*

#### **Hindsight—Litigation That Might Have Been Avoided**

*Major R. Alan Miller*

#### *Contract Appeals Division*

This is part of a continuing series of articles discussing ways in which contract litigation may be avoided. The trial attorneys of the Contract Appeals Division will draw on their experiences and share their thoughts on how to avoid litigation or develop the facts in order to ensure a good litigation posture.

#### **The Problem**

First thing Monday morning, the post contracting officer rushes into your office, ranting and raving about lawyers. You put down your coffee cup, wait for her to calm down, and ask her to restate the problem in more concrete terms. The problem, she tells you, is "money-grubbing lawyers." Gently reminding her that you are an esteemed member of the bar yourself, you ask for specifics.

The contracting officer has received notice of the filing of an Equal Access to Justice Act (EAJA) petition

with the Armed Services Board of Contract Appeals (ASBCA). The petition was filed by the attorney who represented Lurch Construction in a recent appeal to the ASBCA. She does not know what the EAJA is and wants to know how this attorney thinks the government can be made to pay *his* legal fees! You tell her that it is possible, but you first need to know the underlying facts of Lurch's recent appeal. She relates the following:

Lurch Construction, a small business, was awarded a contract to build the new Child Development Center on post approximately a year ago. Part of the government design required Lurch to install a specific intercom system in the building. That particular intercom system required that the interior walls be constructed in a very specific manner and that a special type wiring be installed in a special way to avoid interference. When Lurch's subcontractor, Addams Intercoms, tried to install the special intercom system, it found that the wall

design was defective and that the wiring had not been done properly. A disagreement over which party was responsible ensued and the contracting officer directed Lurch to make the necessary modifications to the building to accommodate the intercom system. Lurch performed the work and later put in a claim of \$110,353, based on the changes clause in the contract. Lurch claimed that because neither Addams nor Lurch had design responsibility and because Lurch had constructed the walls and installed the wiring in strict conformance with the plans and specifications, the government was responsible and should pay.

In discussions with the post engineers who designed the project, the contracting officer discovered that the wall design was indeed improper for the type of intercom system required, but the engineers claimed that the contractor should have known what type of wire to install and how to install it. Without consulting her legal advisor (your predecessor), the contracting officer issued a final decision letter that conceded entitlement on the issue of the wall design, but attributed the wiring problem to a lack of expertise on the part of the contractor. She advised the contractor to submit its proposal for the amount of the claim attributable to the walls. Shortly thereafter, the contractor submitted a detailed claim in the amount of \$27,340. Based on advice from the engineers, the contracting officer responded to the contractor's claim by offering \$2000 as a maximum in settlement of the claim and by informing the contractor that if it did not accept the \$2000, then "the government will issue a unilateral claim amount of \$0.00." The contractor responded that it would not be able to accept any amount less than \$21,922. Negotiations on quantum broke down at this point.<sup>1</sup>

The contractor appealed the contracting officer's final decision to the ASBCA claiming \$43,000. The government urged denial of the appeal in its entirety, claiming that the contractor was responsible for the majority of costs that it incurred in complying with its contractual obligations. Nevertheless, some eight months later, the parties executed a settlement agreement whereby the contractor received \$23,946, plus interest, "in full and complete settlement of its pending appeal." The settlement agreement reserved the contractor's right to pursue attorney's fees and other expenses. Having informed you

of the background facts, the contracting officer wants your advice about the EAJA application.

### Analysis

Because the contracting officer claims ignorance of "EAJA," a short review of the application of the Equal Access to Justice Act to contract appeals is in order.<sup>2</sup> The Equal Access to Justice Act<sup>3</sup> was passed because Congress believed that individuals and small businesses were not able to adequately defend their rights in litigation against the government due to the high costs. In order to remove some of the deterrent effect, the Act provides that certain small businesses may recover attorneys' fees and other costs if they prevail in litigation with the United States where the government's position is not substantially justified. In 1985 Congress amended the EAJA to apply to litigation before the boards of contract appeals.<sup>4</sup>

In order to succeed in its application, a contractor must have been the prevailing party.<sup>5</sup> Generally speaking, if the contractor succeeds on any significant issue in the litigation that achieves some of the benefit it sought in bringing the claim, then it will be deemed the prevailing party for purposes of EAJA.<sup>6</sup> Settlement of a dispute does not necessarily prevent the board from determining that the contractor was the prevailing party. In one case, the board assumed that there was a logical nexus between the litigation and the claim because the contractor obtained a substantial amount of the claim sought. As a result, the board found the contractor to be the prevailing party.<sup>7</sup>

If the contractor is deemed the prevailing party, the burden shifts to the government to show that its position was substantially justified.<sup>8</sup> The government's position is substantially justified if "justified to a degree that could satisfy a reasonable person."<sup>9</sup> In looking at the government's actions to determine this factor, the board looks at the entire agency action, from the filing of the claim until its resolution, by whatever means. Not only does the litigation position taken by the government before the board have to be reasonable, but the actions of the contracting officer from the time the claim is filed must also be substantially justified.<sup>10</sup> While the overall requirement for reasonableness is certainly not new, it places the government in the largely untenable posture of

<sup>1</sup> Aside from the EAJA issues, interest on the claim begins to run from the time of filing of the claim with the contracting officer, assuming proper certification, if required. Having conceded entitlement, the contracting officer knew that the contractor was likely to win some amount, so it would have been wise to pay the amount not in dispute (here \$2000) in order to improve the government's position as much as possible. In fairness to the contractor, the contracting officer should pay that to which he or she thinks the contractor is entitled.

<sup>2</sup> The author owes a debt of gratitude to Major John McDaniel, Trial Attorney, Contract Appeals Division, for his assistance with the review of the Equal Access to Justice Act.

<sup>3</sup> 5 U.S.C. § 504 (1982).

<sup>4</sup> 5 U.S.C. § 504(b)(1)(C) (1982).

<sup>5</sup> 5 U.S.C. § 504(a)(1) (1982).

<sup>6</sup> Jen-Beck Associates, Inc., ASBCA No. 29844, 29845, 89-3 BCA ¶ 22,157; Building Services Unlimited, ASBCA No. 33283, 88-2 BCA ¶ 20,611.

<sup>7</sup> 89-3 BCA ¶ 22,157, at 111,523.

<sup>8</sup> Cornella v. Schweiker, 728 F.2d 978 (8th Cir. 1984); E.C. Schleyer Pump Co., Inc., ASBCA No. 33900, 89-1 BCA ¶ 21,194.

<sup>9</sup> Pierce v. Underwood, 108 S. Ct. 2541 (1989).

<sup>10</sup> 5 U.S.C. § 504(b)(1)(E) (1982); T.H. Taylor, Inc., ASBCA No. 26494-0(R), 86-3 BCA ¶ 19,257.

defending as "reasonable" a position that was wrong.<sup>11</sup> Additionally, in recent decisions ASBCA has indicated a preference for reasonableness on the part of contracting officers in other areas as well.<sup>12</sup>

If it is determined that the government's position was not substantially justified, the contractor is entitled to reasonable attorney's fees and other costs. In DOD cases the ASBCA has consistently held that the hourly rate paid cannot be more than the statutory limit of \$75.00 per hour.<sup>13</sup> Beyond the scope of this problem is the determination of the amount of allowable fees and costs under EAJA.

### Further Analysis

Given that short review of EAJA, we must now turn to a recent decision of the ASBCA that could well have dramatic effects on EAJA litigation in the future. In *Dean Kurtz Construction Company*<sup>14</sup> the board sent an ominous message to contracting officers. As you might have guessed, the facts in *Kurtz* are identical to those set out in the problem above, except that in *Kurtz* the contractor sponsored a claim by its subcontractor involving the installation and testing of a fire suppression system.

One aspect of the *Kurtz* decision that merits discussion is the board's determination that the contractor was the prevailing party: "Having obtained a settlement of the appeal . . . applicant is deemed a prevailing party under EAJA. *Petroelec Construction Co., Inc.*, ASBCA Nos. 32999 et al., 87-3 BCA ¶ 20,111."<sup>15</sup> The board is apparently breaking new ground here. *Kurtz* is the first decision in which the board has automatically attributed prevailing party status to the contractor solely because the appeal was settled. The case cited by the board for its statement, when examined closely, does not support such a broad principle. In *Petroelec*, an EAJA case, the board cited two factors to consider in determining whether the contractor was a prevailing party in a case that was settled: 1) Did the contractor through the settlement agreement obtain a significant part of the

relief it sought?; and 2) Was the relief causally related to the filing of the appeals?<sup>16</sup> In deciding the first factor, the board looked only at the settlement figure versus the amount claimed to see if a significant amount of the relief sought was obtained.

Examining the second factor, the board found that the contracting officer's denial of the claim precipitated the appeal, that the contracting officer's failure to issue a decision on other claims caused the contractor to initiate more appeals, and that it was unlikely that a settlement could have been reached if the appeals had not been taken. As a result of these findings, the board found that the relief obtained was causally related to the filing of the appeals.

Notwithstanding the requirements set out in *Petroelec*, the board in *Kurtz* failed to make any findings with regard to the two factors. While it certainly may have made those findings sub silentio, the board reached no conclusions regarding whether the contractor achieved a significant part of the relief it sought or whether the relief obtained was causally related to the filing of the appeals. The board cited no factors in reaching the conclusion that the contractor was a prevailing party other than that the contractor had obtained a settlement. This failure represents a serious departure from precedent in an area where the government's exposure is already significant.

### The Final Analysis

Regardless of the somewhat puzzling decision by the board in *Kurtz*, the contracting officer did a number of things that made it very difficult for the trial attorney to defend the government's position in the EAJA appeal. While the agreement that settled the substantive contract claim reserved the contractor's right to pursue attorney's fees and costs, it is essential, when possible, that the issue of attorney's fees be resolved when the underlying claim/appeal is settled.<sup>17</sup> This is easily done by incorporating specific language into the settlement modification or agreement.<sup>18</sup> Without specific language that makes

<sup>11</sup> Once the burden shifts to the government to defend its position, the government is put in the position of trying to show that its position was reasonable, even though wrong. The question then functionally becomes "How *unreasonable* was the government; that is, was it so unreasonable as to be not substantially justified?" This, of course, puts the government to a heavier burden than would be indicated by the plain meaning of the Supreme Court's language in *Pierce*.

<sup>12</sup> Kinberg, *Hindsight—Litigation That Might Be Avoided*, *The Army Lawyer*, Oct. 1989, at 26.

<sup>13</sup> 5 U.S.C. § 504(b)(1)(a)(ii) (1982); *Kos Kam, Inc.*, ASBCA No. 34684, 88-3 BCA ¶ 21,049.

<sup>14</sup> ASBCA No. 35483, 89-3 BCA ¶ 22,001.

<sup>15</sup> *Kurtz*, 1989 ASBCA LEXIS 215, at 11.

<sup>16</sup> *Petroelec*, 87-3 BCA ¶ 20,111, at 101,841.

<sup>17</sup> Conversation with the trial attorney in *Kurtz* reveals that the attorneys' fees were not settled with the substantive appeal due to an unreasonably high figure demanded by the contractor.

<sup>18</sup> The following language is intended for inclusion in a contract modification that incorporates the settlement of an appeal, but it may be modified for incorporation into a separate settlement agreement:

This Contract Modification constitutes full and final payment and disposition of any and all matters under and relating to any and all claims by the Contractor arising under Contract No. [insert contract number] including but not limited to those claims set forth in ASBCA No. [if the claim has been appealed, include the ASBCA number here], and a full release and accord and satisfaction as to any and all demands, contractual, or administrative, arising under or related to all claims arising under Contract No. [insert contract number]. This full release and accord and satisfaction includes any and all claims for interest, attorney's fees, and costs arising under any claims by the Contractor pertaining to Contract No. [insert contract number] and ASBCA No. [insert ASBCA No.].

the intent of the parties clear, the board has found that a subsequent EAJA claim was not barred.<sup>19</sup> Local counsel must become involved in drafting the settlement agreement to ensure that this often forgotten element is included.

The contracting officer also hobbled the litigation stance by conceding entitlement on the one hand and then refusing to assume a realistic settlement posture on the other. Furthermore, that unrealistic ("unreasonable" or "not substantially justified") stance was memorialized in a writing which eventually found its way into the appeal file.<sup>20</sup> By refusing to compromise from a ridiculously low counter-offer and then threatening to "issue a unilateral claim amount of \$0.00" if the contractor refused to accept \$2000.00 in settlement, the contracting officer virtually sealed his EAJA fate. The contracting officer had before him a claim upon which he had already conceded entitlement. The subcontractor (through the prime) impliedly acceded to the assertion that only part of its claim was meritorious and had done as the contracting officer had requested: submitted a detailed claim setting out its costs. The contracting officer was hardly the epitome of reasonableness in his response.

While the factors that motivated the contracting officer in *Kurtz* are somewhat obscure,<sup>21</sup> rarely are such actions taken in vindictiveness or bad faith. They are usually motivated by an honest desire to defend the government's interests. What is easily forgotten when a contractor submits a claim is that the contracting officer must then put on a quasi-judicial robe and examine the claim fairly and objectively. The Federal Acquisition

Regulation (FAR) requires that contracting officers "ensure that contractors receive impartial, fair, and equitable treatment."<sup>22</sup> While it sounds almost heretical, the contracting officer must not only consider the best interests of the government; he or she must also strive to maintain the efficacy of the contracting process. Government contracts are not intended to be adversarial in nature. All too often the responsibility to remain objective is overshadowed by what is viewed as protecting the interests of the government. Of course, it is only by remaining objective that the contracting officer can fairly assess the merits of a claim and reach the result that is dictated by fairness to all the parties concerned. The contracting officer in our problem lost her objectivity. She ignored the facts and the evidence before her and, for whatever reason, became a zealous government advocate. As a direct result of her actions, the government paid more in settlement of the appeal than the contractor's lowest offer before the appeal was taken.

### Solution

You should inform the contracting officer in our problem that the contractor is probably entitled to recover attorney's fees under EAJA. More important, you should use this opportunity to reinforce the need for the contracting officer to consult with you at all stages of claims resolution. Her initial position on a claim may well affect the EAJA issues as well as the resolution of the substantive appeal. You should further emphasize the importance of her role as an impartial, objective arbiter of contract disputes, especially in light of the recent decisions of the board in these areas.

<sup>19</sup> Peter Kraus Versorgungstechnik GmbH, ASBCA No. 27256, 87-2 BCA ¶ 19,880.

<sup>20</sup> In addition to the obvious difficulty this caused the trial attorney when attempting to defend the government's position, there are two other issues that merit some mention. The first is the reduction of the contracting officer's position to a writing that was eventually introduced as documentary evidence. The trial attorney in *Kurtz* related that he was dealing with an aggressive contracting officer who probably felt that the government's position had greater weight when set out in writing to the contractor. Nonetheless, while testimony as to the contracting officer's position could certainly have been elicited at hearing, it is somewhat less than circumspect to reduce settlement discussions such as this to writing. Undoubtedly, the settlement agreement itself must be written, but preliminary matters, opening offers, counter-offers, and discussions should be conducted orally. Testimony at hearing, especially if contradictory, as it might have been on such an issue as this, presumably takes on less weight than documentary evidence when the hearing judge returns to chambers to draft an opinion. The second issue may be more important — consideration of settlement discussions by the board as evidence on the merits of the issue of substantial justification. As a matter of practice, settlement discussions are considered "off the record." The parties usually will agree that statements made during settlement discussions will not be revealed or used against the other party. The fact that the board considered these usually sacrosanct matters as evidence on the merits of the main issue before it does not bode well. The board should have refused to consider the writing at all. See Fed. R. Evid. 408. If the board intends to begin considering settlement discussions for any reason, much less on the merits, it could well have a chilling effect on the resolution of claims short of litigation.

<sup>21</sup> The trial attorney in *Kurtz* mentioned that the first settlement offer, prior to the appeal being taken, was not coordinated with counsel. The trial attorney related that this particular contracting officer was an aggressive advocate of the government's position and that the \$2000 figure may well be what he actually thought the contractor deserved. The message to all local counsel? While it is certainly much easier said than done, assure that all actions with regard to contractor claims are coordinated with the legal advisor in advance.

<sup>22</sup> FAR 1.602-2(b).

## Regulatory Law Office Note

### Bypassing Local Utilities

Deregulation of the natural gas industry may afford facilities engineers, contracting officers, and their lawyers more than one source of natural gas. Some installations have procured low cost gas supplies through special industrial programs of local gas utilities. Other installations have bypassed their local gas utility by procuring gas and gas transportation services in the interstate market. These competitive opportunities have significantly reduced utility bills for installations.

Several recent rate regulation cases have addressed the issues raised when bypassing the local gas utility. Bypass occurs when gas is delivered to the customer's metering point without use of the facilities of the local gas distribution company. Local gas distribution companies are regulated by state authorities and the rates charged are determined through a rate making process. By bypassing the local company, the customer gets the lower rates available on the interstate "spot market" in natural gas.

The most common form of "bypass" is direct service to the end user by an interstate pipeline. Interstate pipeline companies are regulated by the Federal Energy Regulatory Commission (FERC). Bypass is possible because of Order No. 436, in *Regulation of Natural Gas Pipelines After Partial Well-head Decontrol* FERC Docket No. RM 85-1-000, October 9, 1985, 50 Fed. Reg. 42,408 (1985), and Order No. 500-E, as amended in FERC Docket No. RM 87-34-055, May 6, 1988, 53 Fed. Reg. 16,859-16,862 (1988). The FERC rules were intended to encourage competition in the interstate gas industry.

The opportunity to bypass the local utility is largely a matter of geography. The customer served by a gas utility either is or is not proximate to an interstate pipeline. If the customer is close by, then the large customer may be able to connect to that pipeline and use it to transport gas that the customer has procured out of state on the spot market. Where the opportunity to bypass exists, it greatly increases the potential suppliers for natural gas to a large customer, like an Army installation.

The local gas distribution company, faced with such competition, may offer competitive rates or may oppose such a "bypass" in various regulatory forums. From the viewpoint of the local gas distribution company, the delay caused by the litigation is economically advantageous because, until the resolution of the litigation, the local company continues to supply their more expensive gas. In the current regulatory climate, local gas distribution companies are more litigious.

Illustrative of this type of litigation is the decision in *Williams Natural Gas Co. v. Oklahoma City*, 890 F.2d 1255 (10th Cir. 1989). In that case, Williams Natural Gas Company (WNG) had won a competition for gas service to a gas fired co-generation project. WNG is an interstate natural gas company, whose bypass was opposed by Oklahoma Natural Gas (ONG), the local gas distribution company, as well as several other parties.

WNG petitioned for a certificate of convenience and necessity from the FERC, under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f (1982), to build a twelve-mile extension from the existing interstate pipeline. Although the local gas company opposed that action, FERC allowed WNG to build the extension to serve the customer.

When WNG instituted condemnation proceedings for its pipeline extension right-of-way, ONG sought and received injunctive relief in state court to stop construction of the WNG "bypass" pipeline in ONG's franchised service area. ONG argued that FERC's authority to authorize "bypass" by an interstate pipeline was limited by *Panhandle E. Pipe Line Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329 (1951). In a parallel proceeding in federal district court, Williams sought and was denied injunctive relief from the state court injunction. The United States Court of Appeals for the Tenth Circuit reversed the federal district court and held that FERC regulation preempted the state court action. Thus, after much delay, Williams was able to bypass the local gas distribution company.

The New Jersey Supreme Court has rendered a decision that may thwart some efforts to "bypass" local gas distribution utilities in that state. In *South Jersey Gas Co. v. SunOlin Chem. Co.*, 116 N.J. 251, 561 A.2d 561 (1989), the court upheld a decision by New Jersey regulators that SunOlin was unlawfully bypassing the local distribution utility by making sales to one customer, the B.F. Goodrich Company. SunOlin was using an interstate pipeline to bypass the local utility. Unlike Williams Natural Gas, SunOlin was a New Jersey utility subject to state regulation. The court's ruling was based on the marketing campaign conducted by SunOlin to furnish gas service to several major industrial customers in the state. It characterized SunOlin's effort as an attempt to "skim the cream" from the state market for natural gas. The court did caution the New Jersey Board of Public Utilities that the state regulators would not have jurisdiction over isolated transactions that had no economic impact on the regulated market.

Three recent cases in which courts have permitted bypass of a local distribution utility are *Michigan Consol. Gas Co. v. FERC*, 883 F.2d 117 (D.C. Cir. 1989); *Michigan Consol. Gas Co. v. Panhandle E. Pipe Line Co.*, 887 F.2d 1295 (6th Cir. 1989); and *Michigan Consol. Gas Co. v. Economic Reg. Admin.*, 889 F.2d 1110 (D.C. Cir. 1989). Given the conflicting decisions of the state and federal courts in "bypass" litigation, it seems likely the United States Supreme Court may soon have an opportunity to address the issues raised in these cases.

Where bypass is not possible or economical, some competition to furnish gas supply may be allowed under a state gas transportation tariff. Therefore, installations should consider the possibility of acquiring gas under these procedures.

The Engineering and Housing Support Center (CEHSC-C) at Fort Belvoir, Virginia, provides technical assistance for natural gas procurement to Army installations. This assistance is especially important in a competitive acquisition of gas supplies. Details regarding the technical assistance available from CEHSC-C may be obtained by facilities engineers through their chain of command.

Contract attorneys at installations acquiring the transportation of natural gas should endeavor to stay abreast of the rapidly developing case law. In accordance with AR 27-40, local installations should advise the Regulatory Law Office (JALS-RL) of proposed rate increases of the local gas distribution company, or interstate pipelines which provide gas utility or transportation service to the installation.

## Clerk of Court Notes

### Revised Court-Martial Rates

Have you been wondering why we have not published Army court-martial rates during the past year? The reason is that we have been wondering, too—about the average Army strength, which is used for determining the rates.

As you perhaps know from having calculated rates for your own jurisdiction, the calculation involves multiplying the number of courts-martial in the period (such as a year, a quarter, or a month) by 1,000, then dividing the result by the average strength during the same period. The quotient is the number of courts-martial per 1,000 troops for the chosen period.

Briefly stated, our problem is that the average strength figure we have been receiving from one source may possibly include the 10,000 or so Army reservists who are undergoing initial ADT and who were separately reported to us by a different agency. Pending resolution of that question and determination of larger questions concerning the appropriate strength basis, we will use only the one official figure we receive monthly from PERSCOM.

That somewhat smaller strength figure produces slightly higher court-martial rates. So that you may properly compare the FY 1989 court-martial rates with those of prior years, we print here the rates for FY 1985-1988, recalculated on the same basis.

#### Court-Martial and Nonjudicial Punishment Rates Per Thousand Fiscal Years 1989-1985

	FY 1989 (762,233)	FY 1988 (765,237)	FY 1987 (773,107)	FY 1986 (774,074)	FY 1985 (778,583)
GCM	2.08	2.13	1.89	1.85	1.82
BCDSPCM	1.12	1.21	1.36	1.61	1.68
SPCM	.24	.24	.28	.35	.47
SCM	1.79	1.84	1.93	1.77	1.68
NJP	109.44	120.09	129.20	144.37	155.61

### Military Justice Statistics, FY 1987-1989

We offer for your consideration and analysis military justice data from the Army Court-Martial Management Information System (ACMIS). Data as to general and special courts-martial is entered from case reports filed by the military judge in each case. Data as to summary courts-martial and nonjudicial punishment is entered

from the "JAG-2 Reports" submitted monthly by GCM jurisdictions.

Similar statistics for Fiscal Years 1984-1986 were published in the November 1987 issue of *The Army Lawyer*, at page 53.

#### Military Justice Statistics, FY 1987-1989 General Courts-Martial

FY	Cases	Conv. Rate	Disch. Rate	Pleas	Judge Alone	Courts w/Enl	Drug Cases	Rate/ 1,000
1987	1,463	96.3%	89.2%	68.4%	71.2%	17.9%	33.7%	1.89
1988	1,629	95.7%	88.3%	67.0%	67.7%	20.5%	33.0%	2.13
1989	1,585	94.5%	87.6%	62.6%	63.8%	24.9%	31.4%	2.08

### Bad-Conduct Discharge Special Courts-Martial

<u>FY</u>	<u>Cases</u>	<u>Conv. Rate</u>	<u>Disch. Rate</u>	<u>Pleas</u>	<u>Judge Alone</u>	<u>Courts w/Enl</u>	<u>Drug Cases</u>	<u>Rate/ 1,000</u>
1987	1,053	95.1%	69.8%	66.8%	78.6%	14.0%	25.4%	1.36
1988	924	94.5%	64.9%	63.6%	73.2%	17.4%	25.1%	1.21
1989	850	92.8%	62.6%	63.6%	69.2%	21.5%	26.3%	1.12

### Other Special Courts-Martial

<u>FY</u>	<u>Cases</u>	<u>Conv. Rate</u>	<u>Disch. Rate</u>	<u>Pleas</u>	<u>Judge Alone</u>	<u>Courts w/Enl</u>	<u>Drug Cases</u>	<u>Rate/ 1,000</u>
1987	215	83.2%	NA	47.9%	65.5%	24.6%	7.4%	.28
1988	182	85.1%	NA	50.5%	64.8%	23.0%	7.1%	.24
1989	185	80.5%	NA	40.0%	52.4%	36.2%	6.4%	.24

### Summary Courts-Martial

<u>FY</u>	<u>Cases</u>	<u>Conv. Rate</u>	<u>Pleas</u>	<u>Drug Cases</u>	<u>Rate/ 1,000</u>
1987	1,492	94.1%	46.8%	12.6%	1.93
1988	1,410	93.1%	UNK	12.6%	1.84
1989	1,365	94.6%	UNK	10.3%	1.79

### Nonjudicial Punishment

<u>FY</u>	<u>Total</u>	<u>Formal</u>	<u>Summarized</u>	<u>Drugs</u>	<u>Rate/ 1,000</u>
1987	99,886	79.2%	20.8%	13.2%	129.20
1988	91,898	80.6%	19.4%	12.5%	120.09
1989	83,413	79.9%	20.1%	9.9%	109.44

### Court-Martial Processing Times, FY 1989

The table below shows the Armywide average processing times for general courts-martial and bad-conduct discharge special courts-martial for the four quarters of Fiscal Year 1989.

#### General Courts-Martial

	<u>1st Qtr</u>	<u>2d Qtr</u>	<u>3d Qtr</u>	<u>4th Qtr</u>
Records received by Clerk of Court	363	386	443	363
Days from charging or restraint to sentence	45	43	43	45
Days from sentence to action	59	50	49	56
Days from action to dispatch	6	6	4	7
Days from dispatch to receipt by the Clerk	10	11	12	10

#### BCD Special Courts-Martial

Records received by Clerk of Court	122	126	139	110
Days from charging or restraint to sentence	31	27	28	33
Days from sentence to action	50	42	40	50
Days from action to dispatch	4	4	3	4
Days from dispatch to receipt by the Clerk	8	10	9	8

Lately, some original records have been followed by required documents (such as defense submissions to the convening authority) that were not initially included in the record. When the Clerk of Court receives required documents only after receiving the original record, the date of dispatch and the date of receipt are changed to the later dates, thereby increasing the number of days from action to dispatch.

# TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

## Criminal Law Notes

### Use of the Negative Urinalysis Result

Before government labs report urinalysis results as positive for marijuana or other drugs, the drug or metabolite concentration level in the urine must exceed certain levels during screening and confirmatory tests.<sup>1</sup> These levels are set by regulation and accomplish several purposes, to include quality control and, in the case of marijuana, to compensate for low levels resulting from possible innocent, passive inhalation. Accused soldiers facing drug use charges not resulting from urinalysis tests may be tempted to argue that negative screening tests support their claim that they did not use drugs. Despite being "negative" under service regulations, however, a result above zero but below the legal cut-off could reflect drug use. Accordingly, trial counsel may consider using a negative test that shows some level of illegal drugs to rebut the defense claim that there was no use or to affirmatively show the accused used the drug as charged. The purpose of this note is to warn counsel that they must be cautious when trying to make any use of a negative screening test.

In *United States v. Arguello*<sup>2</sup> an informant observed SSG Arguello using marijuana on various occasions, to include the day before SSG Arguello provided a urine sample for drug testing. The test results were negative. At trial, defense counsel presented evidence of SSG Arguello's negative screening test results. A defense expert testified that SSG Arguello should have tested positive if he had used marijuana the day before the test.

On cross-examination, the defense expert testified about the screening test reading actually obtained from SSG Arguello's sample. From this reading, he concluded that the sample could have contained a concentration of the marijuana metabolite from zero up to the legal cut-off. In rebuttal, a government expert stated that the level detected in the screening test conclusively demonstrated some presence of the marijuana metabolite, despite the negative result reported under the regulation. Trial counsel then argued that the testimony of both

experts supported the government theory of marijuana use.

At trial and on appeal, the defense argued for dismissal of the charge because the government disposed of the relevant, supposedly exculpatory, and negative urine sample of SSG Arguello. Rather than decide the case on the basis of loss of evidence, the Court of Military Appeals focused on the government's violation of its own regulation<sup>3</sup> by using the negative urinalysis result to support its argument of marijuana use. By arguing that Arguello's negative test affirmatively showed marijuana use, the trial counsel went beyond rebuttal of the defense argument that the negative test reflected no use. In so doing, the trial counsel acted contrary to the regulation<sup>4</sup> and thereby denied due process to SSG Arguello.

The court explained that the government expert's testimony may have been logically relevant as a matter in rebuttal, but it was not legally relevant to affirmatively show drug use in light of the regulation.

Neither the court nor the applicable regulation<sup>5</sup> preclude all rebuttal by the prosecution when the defense argues that a negative urinalysis equates to no use. Trial counsel presenting rebuttal must ensure that adequate limiting instructions confine consideration of the evidence to fair rebuttal; further government use of screening test levels to affirmatively show marijuana use is impermissible. Despite the restrictions placed upon trial counsel, defense counsel should seriously consider not raising the issue of a negative screening test unless the results actually show zero metabolites in the accused's sample. Practically, court members will find it very difficult to adhere to an instruction that essentially says that rebuttal of evidence of "no use" does not equal evidence of "use." The harm to the defense case will almost certainly outweigh any benefit that may be gained.

Judge Cox, concurring in the *Arguello* result, would not have allowed the screening test results to be admitted

<sup>1</sup> The current screening level for marijuana (THC) is 100 nanograms per milliliter. Cut-off levels for the gas chromatography/mass spectrometer confirmatory test, in nanograms per milliliter:

Amphetamines	500	Morphine	4000
Barbiturates	200	Codeine	2000
THC (Marijuana)	15	Heroin	10
Benzoyllecgonine (Cocaine)	150	PCP	25

<sup>2</sup> 29 M.J. 198 (C.M.A. 1989).

<sup>3</sup> Dep't of Defense Directive 1010.1, Alcohol and Drug Abuse Program (Dec. 28, 1984) [hereinafter DOD Dir. 1010.1], as amended by DOD Dir. 1010.1 (Ch. 1., Dec. 12, 1986).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* Paragraph H(3)(b) states, in relevant part:

The report to the originating unit shall specify which specimens were positive and which were negative. No further information concerning negative specimens shall be submitted to the originating unit, except where . . . [a] service member accused of drug use in a disciplinary or administrative proceeding offers a negative urinalysis report to establish non-use, and the Government's representative requests further information concerning the negative report for rebuttal purposes.

into evidence. He noted that the screening test is used only to determine whether further confirmatory testing is needed. As such, he believes that the screening test is irrelevant to guilt or innocence<sup>6</sup> and is not "reasonably relied upon by experts in the particular field in forming opinions or inferences"<sup>7</sup> concerning drug use. MAJ Warner.

### Epileptic Seizures and Criminal Mens Rea

In *United States v. Rooks*<sup>8</sup> the Court of Military Appeals considered the effect of the accused's apparent epileptic seizure on the providence of his plea of guilty<sup>9</sup> to assault with a means likely to produce grievous bodily harm.<sup>10</sup> The court concluded that "seizures attendant to epilepsy render an accused unable to form the mens rea required for conviction."<sup>11</sup> The court's rationale was stated as follows: "This condition is simply one which is not amenable to correction or to punishment. No societal interest is furthered by criminalizing acts committed in the throes of a seizure, where there is no control over one's reflexes."<sup>12</sup>

As the court's language in *Rooks* clearly indicates, a nexus is required between the epileptic condition and the charged offense in order to excuse the accused's misconduct.<sup>13</sup> Thirty-five years earlier, in *United States v. Johnson*,<sup>14</sup> the court observed that "[a]n epileptic seizure which produces an offense, would, of course, constitute a defense."<sup>15</sup> The court further noted, however, that the "underlying epileptic condition [in this case] does not at all signify that an accused committed a particular offense during a moment when reason was dethroned by epilepsy."<sup>16</sup> The court concluded in *Johnson* that the accused's diagnosed epilepsy did not excuse his alleged fraudulent enlistment,<sup>17</sup> because "it is diffi-

cult to imagine that, during the entire period involved in his enlistment . . . the accused was in the throes of an epileptic fit unnoted by recruiters."<sup>18</sup>

A second limitation to the so-called "epileptic-seizure defense" is less apparent. An accused's otherwise criminal misconduct should not be excused, even if performed in the throes of a seizure, if that seizure and the resulting consequences were foreseeable and the accused was negligent in dealing with the potential risk.<sup>19</sup>

For example, assume that a soldier has a history of violent, epileptic seizures. During several past episodes, this soldier has obtained objects within his reach and struck bystanders with them. Assume further that the soldier knowingly keeps several unsecured machetes at his residence. If the soldier later grabs a machete at his home and strikes a guest with it who has not been forewarned by the accused about his condition, then the accused might not be wholly excused for his misconduct, even if it were performed during the course of a seizure. He could, for example, be found guilty of an assault-type offense based upon negligence.<sup>20</sup> If the victim died, the soldier could conceivably be found guilty of involuntary manslaughter under a culpable negligence theory<sup>21</sup> or of negligent homicide,<sup>22</sup> depending upon the degree of negligence attributable to him.

One final aspect of the *Rooks* decision is worth noting. The accused in *Rooks* was examined by a sanity board prior to trial, and neither the trial defense counsel nor appellate defense counsel before the Army Court of Military Review asserted the "epileptic-seizure defense."<sup>23</sup> The Court of Military Appeals nonetheless returned the case to the lower appellate court to determine whether the accused possessed the necessary criminal mens rea for the alleged offense.<sup>24</sup> In this regard,

<sup>6</sup> *Arguello*, 29 M.J. at 207 (citing Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 401 and 402 [hereinafter MCM, 1984, and Mil. R. Evid.]).

<sup>7</sup> *Id.* (citing Mil. R. Evid. 703).

<sup>8</sup> 29 M.J. 291 (C.M.A. 1989).

<sup>9</sup> See generally Uniform Code of Military Justice art. 45(a), 10 U.S.C. § 845(a) (1982) [hereinafter UCMJ].

<sup>10</sup> A violation of UCMJ art. 128(b)(1); see MCM, 1984, Part IV, para. 54b(4)(a).

<sup>11</sup> *Rooks*, 29 M.J. at 292 (emphasis in original).

<sup>12</sup> *Id.* (citing Model Penal Code and Commentaries 212, 219 (1985)).

<sup>13</sup> See generally 2 P. Robinson, Criminal Law Defenses § 171 (1984).

<sup>14</sup> 14 C.M.R. 143 (C.M.A. 1954).

<sup>15</sup> *Id.* at 148.

<sup>16</sup> *Id.*

<sup>17</sup> A violation of UCMJ art. 83; see MCM, 1984, Part IV, para. 7.

<sup>18</sup> *Id.*

<sup>19</sup> See generally 2 P. Robinson, *supra* note 13, § 162(d) (discussing *Fain v. Commonwealth*, 78 Ky. 183 (1879)).

<sup>20</sup> For example, an assault by offer or by battery in violation of UCMJ art. 128. See MCM, 1984, Part IV, paras. 54c(1)(b)(ii) & (2)(a).

<sup>21</sup> A violation of UCMJ art. 119(b)(1). See MCM, 1984, Part IV, para. 44.

<sup>22</sup> A violation of UCMJ art. 134. See MCM, 1984, Part IV, para. 85.

<sup>23</sup> *Rooks*, 29 M.J. at 292-93.

<sup>24</sup> *Id.* at 293.

*Rooks* is but the latest example of the court's willingness to consider issues relating to the accused's mental responsibility<sup>25</sup> regardless of whether it was litigated below.<sup>26</sup> MAJ Milhizer.

### Damaging Property and Mens Rea

Two recent cases discuss the military offenses that prohibit damaging, destroying, and otherwise unlawfully disposing of property. These cases point out how the offenses vary, depending upon whether the property is military or personal. Perhaps the most important of these differences concerns the mens rea requirements for each of these crimes.

Article 108<sup>27</sup> proscribes offenses against military property of the United States.<sup>28</sup> Prohibited conduct includes the sale, loss, damage, destruction, and wrongful disposition of the property.<sup>29</sup> The accused's misconduct can be willful<sup>30</sup> or negligent.<sup>31</sup> An article 108

violation can also be constituted if the accused suffers the loss, damage, destruction, sale, or wrongful disposition of military property.<sup>32</sup>

A recent case involving an article 108 charge is *United States v. Washington*.<sup>33</sup> The accused in *Washington* was convicted of willfully damaging and destroying a military legal office and property therein. The court found that the following evidence was sufficient to support the accused's conviction: the accused was caught leaving a burning building carrying a container of gasoline, which he was emptying while he fled; the fire severely damaged a legal office where incident reports involving the accused were filed; and stolen incident reports were found in the accused's car.<sup>34</sup>

The mens rea requirement for the offense of damaging or destroying personal, nonmilitary property,<sup>35</sup> as proscribed by article 109,<sup>36</sup> is more limited.<sup>37</sup> Mere negligence or recklessness does not satisfy the specific intent

<sup>25</sup> See generally MCM, 1984, Rule for Courts-Martial 916(k) [hereinafter R.C.M.].

<sup>26</sup> E.g., *United States v. Dock*, 28 M.J. 117 (C.M.A. 1989); *United States v. Massey*, 27 M.J. 371 (C.M.A. 1989).

<sup>27</sup> UCMJ art. 108.

<sup>28</sup> *Id.*; see MCM, 1984, Part IV, para. 32b. The term "military property" includes all property, real or personal, owned, held, or used by a military service of the United States, regardless of use. MCM, 1984, Part IV, para. 32c(1); *United States v. Blevins*, 34 C.M.R. 967 (A.F.B.R. 1964). Numerous items have been determined to be military property, including watches (*United States v. Ford*, 30 C.M.R. 3 (C.M.A. 1960)); promotion examinations (*United States v. Reid*, 31 C.M.R. 83 (C.M.A. 1961)); an electric drill (*United States v. Foust*, 20 C.M.R. 450 (A.B.R. 1955)); a gate (*United States v. Meirthew*, 11 C.M.R. 450 (A.F.B.R. 1953)); sheets, a mattress, and a mattress cover (*United States v. Burrell*, 12 C.M.R. 943 (A.F.B.R. 1953)); sinks, pipes, and window casements (*United States v. Tomasulo*, 12 C.M.R. 531 (A.B.R. 1953)); and a camera in a ship's store (*United States v. Simonds*, 20 M.J. 279 (C.M.A. 1985)). The term does not include property belonging to a nonappropriated-fund organization (property of officer's club) that is not furnished to a military service for use by the military service (*United States v. Geisler*, 37 C.M.R. 530 (A.C.M.R. 1965)), and does not include property of the Army and Air Force Exchange Service (*United States v. Underwood*, 41 C.M.R. 410 (A.C.M.R. 1969); *United States v. Schelin*, 12 M.J. 575 (A.C.M.R. 1981), *aff'd*, 15 M.J. 218 (C.M.A. 1983); but see *United States v. Harvey*, 6 M.J. 545 (N.C.M.R. 1978); *United States v. Mullins*, 34 C.M.R. 694 (N.B.R. 1964) (property of Navy Exchanges held to be military property)).

<sup>29</sup> UCMJ art. 108; MCM, 1984, Part IV, para. 32b. For a collection of cases pertaining to this offense, see Criminal Law Deskbook, Crimes and Defenses (Aug. 1989), at pp. 1-61 to 1-69.

<sup>30</sup> Willful damage, destruction, or loss is one that is intentionally caused; it refers to purposely and knowingly doing an act specifically intending the natural and probable consequences of the act. *United States v. Boswell*, 32 C.M.R. 726 (C.G.B.R. 1962); see, e.g., *United States v. Peacock*, 24 M.J. 410 (C.M.A. 1987) (intentionally placing rivets and nuts in an auxiliary fuel tank, thus temporarily impairing a military aircraft's operational readiness); *United States v. George*, 35 C.M.R. 801 (A.F.B.R. 1965) (intentionally removing perishable serums from a refrigerator in a medical warehouse in the tropics and leaving them at room temperature).

<sup>31</sup> UCMJ art. 108; MCM, 1984, Part IV, para. 32b; see, e.g., *United States v. Miller*, 12 M.J. 559 (A.F.C.M.R. 1981) (accused permitted an unlicensed 16-year-old military dependent to operate a truck under his control; an accident damaging the vehicle resulted); *United States v. Lane*, 34 C.M.R. 744 (C.G.B.R. 1963) (intentionally turning wheels controlling flood valves on a floating drydock in which a vessel was berthed, thereby consciously setting in motion a sequence of events that reasonably would lead to some kind of harm, even though the precise damage to the vessel was not specifically intended); *United States v. Traweck*, 35 C.M.R. 629 (A.B.R. 1965) (entering a government helicopter and starting the motor to generate heat for warmth and thereby damaging the helicopter). Negligent damage exposes the accused to a lesser potential maximum punishment than does willful damage. See MCM, 1984, Part IV, para. 32e.

<sup>32</sup> UCMJ art. 108; MCM, 1984, Part IV, para. 32b(3). The term "suffer," as used in the context of article 108, means "to allow or permit." MCM, 1984, Part IV, para. 32c(2); see *United States v. Johnpier*, 30 C.M.R. 90 (C.M.A. 1961); see, e.g., *United States v. O'Hara*, 34 C.M.R. 721 (N.B.R. 1964) (intentionally losing military property by pushing it over the side of a ship). "Suffer" may be used in connection with willful and intentional conduct, as well as a negligent dereliction. MCM, 1984, Part IV, para. 32c(2); *O'Hara*, 34 C.M.R. 721 (N.B.R. 1964).

<sup>33</sup> 29 M.J. 536 (A.F.C.M.R. 1989).

<sup>34</sup> *Id.* at 540.

<sup>35</sup> This property includes all property, real and personal, that is not military property of the United States. See MCM, 1984, Part IV, para. 33c(2); see, e.g., *United States v. Valadez*, 10 M.J. 529 (A.C.M.R. 1980) (a rental car, two passenger cars, a fence owned by a German corporation, and a German road marker); *United States v. Bernacki*, 33 C.M.R. 175 (C.M.A. 1963); *United States v. Priest*, 7 M.J. 791 (N.C.M.R. 1979); *United States v. Geisler*, 37 C.M.R. 530 (A.C.M.R. 1965) (real and personal property belonging to an officer's club); *United States v. Underwood*, 41 C.M.R. 410 (A.C.M.R. 1969); *United States v. Schelin*, 12 M.J. 575 (A.C.M.R. 1981), *aff'd*, 15 M.J. 210 (C.M.A. 1983).

<sup>36</sup> UCMJ art. 109 also prohibits wasting or spoiling the real property of another. See MCM, 1984, Part IV, para. 33b(1). "The term 'wastes' and 'spoils' as used in this article refer to such wrongful acts of voluntary destruction of or permanent damage to real property as burning down building, burning piers, tearing down fences, or cutting down trees." *Id.*, Part IV, para. 33c(1).

<sup>37</sup> See MCM, 1984, Part IV, para. 33b(2)(a).

requirement for this offense.<sup>38</sup> The accused's misconduct must be willful, which the Manual defines as intentional.<sup>39</sup>

The specific intent requirement for this offense was recently addressed in *United States v. Garcia*.<sup>40</sup> In *Garcia*, the accused pled guilty, *inter alia*, to wrongfully damaging a nonappropriated-fund activity jewelry display case in a Coast Guard Exchange. Specifically, the accused stated during the providence inquiry that he attempted to pry open the glass of the display case with a screwdriver so that he could steal the jewelry inside.<sup>41</sup> According to the accused, he was "trying to pull the glass up, not break it."<sup>42</sup> When the military judge asked the accused "if he would have broken the glass if necessary to get into the jewelry case, the accused answered, 'No, sir. I wouldn't have broke it.'"<sup>43</sup>

The court in *Garcia* correctly concluded that the accused's intent to pry the glass open was insufficient to satisfy the mens rea requirement for an article 109 offense. The court observed that to be guilty of the charged crime, the accused must have intended to damage the jewelry case by breaking the glass. As the accused lacked this specific intent to damage the property, his conviction was reversed.<sup>44</sup>

The *Washington* and *Garcia* cases illustrate some important and often subtle distinctions between articles 108 and 109. Perhaps most significant among these

differences is Congress's intent to accord greater protection to military property than to private property. Trial practitioners confronting these two offenses must become familiar with the distinct requirements of proof for each. MAJ Milhizer.

### Larceny and Proving Asportation

For over a decade, the military's appellate courts have struggled with the question of when a larceny offense<sup>45</sup> has been completed. *United States v. Cannon*<sup>46</sup> is the latest military case to address this issue. The court's opinion in *Cannon* is important for two reasons: it analyzes when a larceny has terminated as a matter of law and highlights some of the practical problems associated with proving this aspect of the crime.

Black letter military law has long held that larceny under a wrongful taking theory<sup>47</sup> continues until the asportation—that is, the carrying away<sup>48</sup>—is completed. The Court of Military Appeals, in the 1979 case of *United States v. Escobar*,<sup>49</sup> concluded that the original asportation continues as long as the perpetrator is not satisfied with the location of the goods and causes the flow of their movement to continue in a relatively uninterrupted manner.<sup>50</sup> As the court explained later that year in *United States v. Seivers*,<sup>51</sup> a "larceny continues until such time as its fruits are secured in a place where they may be appropriated to the use of the perpetrator of the scheme."<sup>52</sup>

<sup>38</sup> See *id.*, Part IV, para. 33c(2); see, e.g., *United States v. Bernacki*, 33 C.M.R. 175 (C.M.A. 1963) (the accused, who recklessly damaged a civilian car while fleeing apprehension, lacked the requisite mens rea for an article 109 offense); *United States v. Priest*, 7 M.J. 791 (N.C.M.R. 1979) (the accused, who recklessly damaged a privately owned boat by operating it in shallow water, lacked the requisite mens rea for an article 109 offense).

<sup>39</sup> MCM, 1984, Part IV, para. 33c(2); see *United States v. Valadez*, 10 M.J. 529 (A.C.M.R. 1980); *United States v. Yoakum*, 8 M.J. 763 (A.C.M.R. 1980); *United States v. Jones*, 50 C.M.R. 724 (A.C.M.R. 1975).

<sup>40</sup> 29 M.J. 721 (C.G.C.M.R. 1989).

<sup>41</sup> *Id.* at 722.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* (quoting the Record of Trial).

<sup>44</sup> The court also rejected the argument that the accused's misconduct constituted recklessly spoiling property, as this offense only applies to real property. See *supra* note 36.

<sup>45</sup> A violation of UCMJ art. 121.

<sup>46</sup> 29 M.J. 549 (A.F.C.M.R. 1989).

<sup>47</sup> See MCM, 1984, Part IV, para. 46b(1)(a) & c(1)(b); see generally *United States v. Carter*, 24 M.J. 280 (C.M.A. 1987) (wrongful taking requires dominion, control, and asportation). The drafters of article 121 intended to codify all forms of common law larceny, larceny by false pretenses, e.g., *United States v. Cummins*, 26 C.M.R. 449 (C.M.A. 1958) (false promises to repay a loan), and conversion. See generally *United States v. Mervine*, 26 M.J. 482, 483 (C.M.A. 1988); *United States v. Herndon*, 36 C.M.R. 8 (C.M.A. 1965); TJAGSA Practice Note, *Larceny of a Debt: United States v. Mervine Revisited*, The Army Lawyer, Dec. 1988, at 29. Included within the common law forms of larceny, in addition to larceny by wrongful taking, are larceny by wrongful obtaining and by wrongful withholding. MCM, 1984, Part IV, para. 46b(1); e.g., *United States v. Moreno*, 23 M.J. 622 (A.F.C.M.R.), *pet. denied*, 24 M.J. 348 (C.M.A. 1986) (larceny by a wrongful withholding by writing checks against money erroneously deposited in the accused's account).

<sup>48</sup> 4 W. Blackstone, Commentaries \*231; Black's Law Dictionary 147 (4th ed. 1968).

<sup>49</sup> 7 M.J. 197 (C.M.A. 1979).

<sup>50</sup> *Id.* at 198-99. In *Escobar* the accused hid the victim's leather jacket in some bushes while helping the victim move. Shortly thereafter, the accused retrieved the leather jacket and brought it back with him to the base. *Id.* at 197. The court concluded that the accused had not completed the asportation of the jacket—and thus the larceny had not terminated—until he removed the jacket from its place of temporary concealment in the bushes and took it back to his quarters. *Id.* at 199.

<sup>51</sup> 8 M.J. 63 (C.M.A. 1979).

<sup>52</sup> *Id.* at 65. In *Seivers* the court found that the alleged larceny by fraud was not complete until an insurer's possession of the proceeds of a claim filed by the accused was severed by the accused taking actual possession of the proceeds. This occurred when the accused received the insurance draft at his on-post duty address, endorsed the draft, and then deposited it in his account. *Id.* at 65.

Because the crime of larceny continues throughout the asportation phase, anyone who knowingly assists in the actual movement of the stolen property during that phase may be guilty of larceny as a principal.<sup>53</sup> Whether a person who participates in an on-going larceny is guilty of that offense depends, in part, on his purpose for participating in it. A person may be found guilty of larceny in such circumstances if his purpose was "to secure the fruits of the crime."<sup>54</sup> If his motive was to assist the perpetrator in escaping detection and punishment, however, he would not be guilty of larceny as a principal, but could be guilty as an accessory after the fact.<sup>55</sup> No distinction as to the accused's guilt is recognized based upon whether a joint larceny was prearranged by the participants or was the result of a decision made on the spur of the moment.<sup>56</sup>

Once the asportation is complete, the larceny is likewise completed.<sup>57</sup> For example, in *United States v. Henderson*,<sup>58</sup> the court determined that the

[l]arceny of field jackets and silverware was complete when the soldiers having custody over them moved them to another part of the premises [the central issue facility] with felonious intent, concealing them so that the [accused] could have ready and undetected access to them.<sup>59</sup>

Accordingly, when the accused later obtained these items, his actions did not make him a principal to the larceny that was already consummated.<sup>60</sup> An accused

who obtains stolen property after the asportation has been completed may nonetheless be guilty of receiving stolen property.<sup>61</sup>

The court in *Cannon* accepted this decisional authority and attempted to apply it to the facts in that case.<sup>62</sup> The court was faced, however, with what it characterized as "scant information concerning the initial theft, particularly the timing."<sup>63</sup> These difficulties were further exacerbated by the contrasting specificity of the relatively detailed stipulation of fact and the comparatively cursory providence inquiry.<sup>64</sup>

Based upon the record before it, the court found that the theft of the stereo, which served as the basis for the charged larceny, occurred sometime on 19 January.<sup>65</sup> At 0900 hours on that date, the perpetrator of the larceny sought the accused's assistance in pawning the stereo to obtain money. Consequently, no more than nine hours passed between the initial taking and the accused's involvement. The court concluded on these facts that

regardless of the precise amount of time between the actual theft and [the perpetrator's] appearance at [the accused's] door, it seems circumstantially reasonable to conclude that [the perpetrator] was 'dissatisfied with the location of the stolen goods' and that the asportation phase of this larceny was still ongoing. Accordingly, we find that the trial judge was justified in accepting [the accused's] guilty plea to larceny.<sup>66</sup>

<sup>53</sup> See UCMJ art. 77; MCM, 1984, Part IV, para. 1.

<sup>54</sup> *United States v. Manuel*, 8 M.J. 822, 825 (A.F.C.M.R. 1979).

<sup>55</sup> *Id.*; see UCMJ art. 78; MCM, 1984, Part IV, para. 3.

<sup>56</sup> *United States v. Bryant*, 9 M.J. 918 (A.C.M.R. 1980). In *Bryant* the accused and a friend broke into a locked barracks room "to raise a little hell." The friend took a raincoat and handed to the accused as they exited, asking the accused to hold it. No larceny had been planned prior to the break-in. *Id.* at 919. The court determined that the accused providently plead guilty to the larceny of the raincoat, finding that the asportation had not been completed when the accused took possession of it. The providence of the accused's guilty plea was not affected by the fact that he had not planned to commit the larceny beforehand. *Id.* at 919-20.

<sup>57</sup> See *United States v. Chambers*, 12 M.J. 443 (C.M.A. 1982).

<sup>58</sup> 9 M.J. 845 (A.C.M.R. 1980).

<sup>59</sup> *Id.* at 846. *Henderson* is difficult to reconcile with *Escobar*, 7 M.J. 63 (C.M.A. 1979), where the Court of Military Appeals found that the asportation had not been completed when the stolen jacket was temporarily hidden in some bushes. See *supra* note 50. One way of distinguishing the cases is that the accused in *Escobar* was clearly not satisfied with the location of the stolen jacket while it was concealed in the bushes; the item was exposed to the public and could have easily been taken by a passerby. In *Henderson*, on the other hand, the stolen items were stored in a secured building (the CIF), where the accused would likely feel satisfied that they would not be taken by someone else. Of course, both *Henderson* and *Escobar* are close cases, and the different result in each might be best explained by the fact that different courts resolved close factual questions differently.

<sup>60</sup> *Henderson*, 9 M.J. at 846-47.

<sup>61</sup> A violation of UCMJ art. 134; see MCM, 1984, Part IV, para. 106. A recent case discussing this issue is *United States v. Graves*, 20 M.J. 344 (C.M.A. 1985).

<sup>62</sup> *Cannon*, 29 M.J. at 555.

<sup>63</sup> *Id.*

<sup>64</sup> See *infra* note 65. The bare factual record in *Cannon* is the apparent reason why the facts surrounding the charged larceny are not further detailed in the appellate opinion.

<sup>65</sup> The providence inquiry apparently did not narrow the time of the initial theft of the stereo beyond 16 to 19 January. The stipulation of fact was more specific, establishing that the theft occurred sometime on 19 January. *Id.* Because the stipulation of fact was not inconsistent with the providence inquiry as to this matter, the court in *Cannon* held that its contents could serve as a basis for establishing the facts of the case. The court also noted that the accused would "not be heard to contest, for the first time on appeal, the accuracy of a stipulation under these circumstances." *Id.* at 555 n.4.

<sup>66</sup> *Id.* at 555-56.

The *Cannon* case teaches some obvious lessons. In guilty plea cases, the trial counsel must ensure that the stipulation of fact contains detailed and specific information that establishes that the asportation phase had not been completed when the accused first joined in the larceny. The stipulation should also make clear that the accused's purpose in participating in the larceny was to help secure the fruits of the crime. During the providence inquiry, the trial counsel must ensure that the accused's responses are both consistent with the stipulation of fact and that they independently satisfy all the elements of the charged offense.

In any potential guilty plea case, the trial defense counsel must likewise know the law regarding larceny and its lesser included offenses. In particular, the defense counsel should explore whether the evidence, if it supports guilt at all, is sufficient only for a lesser included offense of larceny, such as receiving stolen property or accessory after the fact.<sup>67</sup> When the accused desires to plead guilty to the greater offense of larceny as charged, the defense counsel must ensure that the accused's version of the facts will support the plea as to issues regarding asportation. Specifically, the accused must be willing to admit during the providence inquiry that his purpose for participating in the larceny was to secure the fruits of the crime and was not merely to help the perpetrator avoid detection or punishment. The accused must also be prepared to acknowledge that the asportation phase of the larceny was not complete when he first joined in the crime.

In contested cases, all counsel must, of course, be prepared to prove or dispute these same facts. When the trial counsel anticipates that the asportation issue will be a close question, the crime of receiving stolen property should be charged alternatively with a larceny. In all such cases, counsel for both sides must be conversant with the relevant legal principles discussed in *Cannon* and effectively marshal the evidence in light of these principles. MAJ Milhizer.

#### **Military Rule of Evidence 410: Much Broader Than Stated**

Military Rule of Evidence 410 may preclude the government's use of an accused's "statement made in the course of plea discussions" at court-martial if the accused ultimately contests the charges.<sup>68</sup> Military Rule of Evidence 410 purports to limit inadmissibility to plea discussion statements made to the convening authority, staff judge advocate, trial counsel, or other counsel for the government. Subsection (b) of the rule extends inadmissibility to statements made by the accused "solely for the purpose of requesting disposition under an authorized procedure for administrative action in lieu of trial by court-martial." Because a request for discharge may contain a confession and is presented initially to the accused's immediate commander, case law

adds the commander to those with whom the accused could discuss administrative actions in a protected manner. Recent case law indicates how much farther the Court of Military Appeals is willing to go beyond the strict wording of the rule.

In *United States v. Barunas*<sup>69</sup> the Court of Military Appeals dealt with a letter the accused sent his commander. In the letter the accused admitted to using cocaine, pointed out the devastating effects of a general court-martial, and asked the commander to consider lesser forms of punishment. The letter did not contain an offer to plead guilty or any indication that the accused felt his statement would be held in confidence. The letter was not part of ongoing plea negotiations and carried no references to administrative discharge procedures, specifically or generally. Requirements for submitting a request for administrative disposition were not met to any degree. Nevertheless, the Court of Military Appeals found the letter to be a part of the administrative discharge process in its incipient stage. Accordingly, the letter was determined to have been improperly admitted at trial.

In *United States v. Brabant*<sup>70</sup> the Court of Military Appeals again looked at an accused's statement to his commander that he would do whatever was necessary to make things right with his larceny victim. The court commented on the special relationship of trust that should exist between a service member and the commander. Despite the lack of an offer to plead guilty, any indication that the accused felt his statement would be held in confidence, any ongoing plea negotiations, any reference to administrative discharge procedures, or any compliance with administrative disposition request requirements, the court found the statement to be a request for administrative resolution and part of plea bargain negotiations. Accordingly, the statements were improperly admitted at trial.

Despite the specific wording of Military Rule of Evidence 410, it now appears that the government is precluded from using any confessions made to one's commander if they are accompanied by a request for leniency in any form. Commanders must be made aware of this court-created rule and its ramifications before engaging in conversations with service members who may be suspects in criminal activity. MAJ Warner.

#### **Hair Analysis—Overcoming Urinalysis Shortcomings**

Urinalysis testing relies on the body's ability to break down drugs into waste products, or metabolites, which are excreted through urine. Urinalysis then examines the urine for those metabolites that indicate drug use. The same metabolites are also excreted through sweat, feces, and other bodily fluids. Of interest to trial and defense counsel is the fact that these same metabolites are stored in hair. Why is this fact important to the criminal

<sup>67</sup> A violation of UCMJ art. 78; MCM, 1984, Part IV, para. 3.

<sup>68</sup> Mil. R. Evid. 410(a)(4).

<sup>69</sup> 23 M.J. 71 (C.M.A. 1986).

<sup>70</sup> 29 M.J. 259 (C.M.A. 1989).

lawyer? The answer is that hair analysis may overcome two shortcomings of urinalysis testing. First, a urinalysis is unable to detect when a "clean" sample has been contaminated or switched with a "dirty" sample. Secondly, a urinalysis cannot detect when an accused has innocently ingested certain illegal drugs.

A recent article in the *Journal of Forensic Sciences*<sup>71</sup> discusses using radioimmunoassay and gas chromatography/mass spectrometry, the same tests used in urinalysis, to detect drug metabolites in hair samples. After a person uses drugs, a urinalysis test is only effective during the relatively short period it takes the body to cleanse itself of the drug waste products. Metabolites are permanently<sup>72</sup> deposited inside of hair segments being produced when the metabolites are in the bloodstream. Further, the deposit concentration is in direct proportion to the metabolite concentration in the bloodstream at the time. Therefore, hair keeps a record of drug use, even after detection by urinalysis is no longer available.

Urinalysis samples can become contaminated in a number of different ways during the collection, handling, and testing processes. The accused usually has no way of proving that contamination has occurred. A "clean" retest several weeks after a questioned test will be seen by many as proof only that the accused has abstained from drug use in contemplation of a retest. Hair analysis, however, can focus on metabolite concentrations deposited inside the hair shaft at the time the questioned urine was collected.

If the accused is a victim of innocent ingestion, the urinalysis will not detect the circumstances behind the use, although hair analysis can support or refute this possibility. Various segments of the hair correspond to different periods of time. A one-time use would show up in a small segment of the hair and could tend to support the innocent ingestion theory. Metabolites present in many of the hair segments, however, would indicate repeated use and would tend to refute an innocent ingestion theory.

The same scientific tools and principles that are generally accepted in the scientific community for urinalysis are used in analyzing hair. Consequently, there should be no problem with the *Frye*<sup>73</sup> standard or with the military's less restrictive standard, which simply requires the evidence to be relevant, helpful, and probative.<sup>74</sup>

The Army CID laboratory at Fort Gillem, Georgia, is currently studying the feasibility of performing hair analysis. The current status of the study may be obtained by contacting Mr. Siggins at (404) 362-7268 or AV 797-7268. The only private firm currently known to be performing hair analysis is Psychomedics Corporation of Santa Monica, California. Counsel may contact the firm's director, Dr. Werner A. Baumgartner, at (213) 828-5224, for more information.

An accused who questions a positive urinalysis test result should consider hair analysis along with traditional investigation and other scientific tools. Traditional investigation into the collection, chain-of-custody, and testing procedures remains an important, albeit time-consuming, step. The increasing acceptance of polygraph may also assist the accused who is willing to unconditionally stipulate to the admission of polygraph results.<sup>75</sup> Serological comparison will not help in a contamination situation, but could help determine whether samples were switched. Because of its benefits over urinalysis, hair analysis should now be added as another tool in determining whether an accused is properly charged. MAJ Warner.

#### **Evidence of Rehabilitative Potential—<sup>76</sup> The Bottom Line**

Rule for Courts-Martial 1001(b)(5) states that the government may introduce opinion evidence concerning the rehabilitative potential of the accused during the presentencing stage of a court-martial. A major caveat to this opinion evidence is that the witness cannot base the opinion solely upon the severity of the convicted offense(s).<sup>77</sup> Our military appellate courts recently decided four cases that provide further guidance as to foundational requirements and proper uses of this extremely influential evidence.<sup>78</sup>

#### *United States v. Ohrt*

Air Force Staff Sergeant (SSG) Ohrt pled guilty to one charge and specification of marijuana use. During the presentencing phase of the court-martial, the trial counsel called the accused's commander to provide his opinion concerning the accused's rehabilitative potential. The trial counsel attempted to lay a foundation for the commander's testimony; however, the trial defense counsel interrupted and eventually informed the military judge that the defense did not object to the commander's rehabilitative potential opinion testimony.<sup>79</sup> As a

<sup>71</sup> Baumgartner, Hill, & Blahd, *Hair Analysis for Drugs of Abuse*, 34 J. Forensic Sci. 1433-53 (1989).

<sup>72</sup> *Id.* at 1448. Verified hair samples of John Keats have been shown to contain the opiate used by the Victorian poet 167 years ago to ease the pain of terminal tuberculosis.

<sup>73</sup> *U.S. v. Frye*, 293 F. 1013 (D.C. 1923).

<sup>74</sup> *U.S. v. Gipson*, 24 M.J. 246 (C.M.A. 1987).

<sup>75</sup> The military has not held polygraphs to be per se inadmissible. See *U.S. v. West*, 27 M.J. 223 (C.M.A. 1988); *U.S. v. Gipson*, 24 M.J. 246 (C.M.A. 1987).

<sup>76</sup> R.C.M. 1001(b)(5).

<sup>77</sup> *United States v. Horner*, 22 M.J. 294 (C.M.A. 1986).

<sup>78</sup> *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989); *United States v. Brown*, 28 M.J. 470 (C.M.A. 1989); *United States v. Gunter*, 29 M.J. 140 (C.M.A. 1989); *United States v. Stimpson*, 29 M.J. 768 (A.C.M.R. 1989).

<sup>79</sup> *Ohrt*, 28 M.J. at 308.

result, the military judge told the trial counsel to "press on quickly here to the guts of the testimony."<sup>80</sup> Heeding the military judge's advice, the trial counsel elicited from SSG Ohrt's commander that in his opinion SSG Ohrt had no rehabilitative potential.<sup>81</sup>

During cross-examination, the commander stated that he had reviewed the accused's work record and Annual Performance Reports. The commander admitted that the accused's personnel records indicated "good performance."<sup>82</sup>

A member then asked the commander if he had offered SSG Ohrt nonjudicial punishment for the marijuana use. The commander's reply provided valuable insight into the true basis for his opinion. He stated that he did not offer the accused nonjudicial punishment. The commander explained that, upon assuming command, he had given the following warning to his personnel: "It's if you're allegedly involved with the use of drugs and found to be guilty that I would have no more use for your services in my command."<sup>83</sup>

On recross, the commander stated that he did not base his opinion solely on the seriousness of the offense. The commander stated that he had also considered SSG Ohrt's previous alcohol abuse.<sup>84</sup>

The issue on appeal was whether the commander's opinion was impermissibly based solely upon the severity of the offense (as prohibited by *United States v. Horner*).<sup>85</sup> In deciding this issue, the Court of Military Appeals established three important rules for the use of rehabilitative potential evidence.

First, the court held that an R.C.M. 1001(b)(5) witness must possess sufficient knowledge of the accused to formulate a rationally based opinion. A witness who does not have a rationally based opinion should not be permitted to "influence the court members into returning a particular sentence."<sup>86</sup> When does a witness have a rationally based opinion? This leads to the court's second requirement.

A witness will have a rationally based opinion only when the witness can establish a proper foundation for

that opinion.<sup>87</sup> The proponent of the rehabilitative potential testimony must establish that the witness possesses "sufficient information and knowledge about the accused—his character, his performance of duty as a servicemember, his moral fiber, and his determination to be rehabilitated."<sup>88</sup> Only when this thorough foundation is established will the witness's opinion be helpful.

The court's third requirement for R.C.M. 1001(b)(5) evidence is that the scope of all rehabilitative potential opinion evidence must be limited to whether or not the accused has rehabilitative potential (as opposed to rehabilitative potential for future service). Noting the seriousness of a punitive discharge, the court wrote that R.C.M. 1001(b)(5) cannot be used as "a vehicle to make an administrative decision about whether an accused should be retained or separated."<sup>89</sup> The court noted that too often commanders have improperly expressed their opinions that discharges were appropriate (as opposed to whether accused personnel have rehabilitative potential).

In *Ohrt* the court, voting 2-1, held that the testimony of Ohrt's commander violated these rules. Even though the commander had reviewed the accused's personnel record and had relied upon the accused's previous alcohol abuse, the Court of Military Appeals held that the commander's opinion was improper because it was: 1) based solely upon the seriousness of the offense (lacked the proper foundation); and 2) was intended to impart to the panel the commander's opinion that *all* drug abusers deserve punitive discharges (rather than that SSG Ohrt lacked rehabilitative potential).<sup>90</sup>

The court relied heavily upon the commander's response to the member's question concerning nonjudicial punishment. The court held that the commander's testimony was tainted by his predisposition that there was no place for drug abusers in the military. This predisposition created an opinion that was based solely on the seriousness of the offense.<sup>91</sup> The result was testimony that was intended to urge a punitive discharge.<sup>92</sup>

In footnote 6 of *Ohrt*, the court provided sound trial practice guidance. The court noted that the true basis of

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 309.

<sup>84</sup> *Id.*

<sup>85</sup> 22 M.J. 294 (C.M.A. 1986).

<sup>86</sup> *Ohrt*, 28 M.J. at 303 (emphasis in original).

<sup>87</sup> See Mil. R. Evid. 701.

<sup>88</sup> *Ohrt*, 28 M.J. at 304.

<sup>89</sup> *Id.* at 306.

<sup>90</sup> *Id.* at 307.

<sup>91</sup> Judge Sullivan dissented. He concluded that the commander's opinion was not based solely on the seriousness of the offense. *Id.* at 307.

<sup>92</sup> *Id.* at 307.

the commander's opinion was never fully established.<sup>93</sup> The Court of Military Appeals refused to guess as to the true foundation of the testimony.<sup>94</sup> The court recommended that trial counsel lay the required foundation either at an article 39(a) session or by an offer of proof.<sup>95</sup> This recommendation reappeared in the Court of Military Appeals' next case on this same issue, *United States v. Brown*.<sup>96</sup>

#### *United States v. Brown*

In *United States v. Brown* the accused pleaded guilty to two absences without leave. During sentencing, the trial counsel called an operations specialist chief (E-7) to testify about the accused's rehabilitative potential. On direct, the witness stated that the accused had no rehabilitative potential.<sup>97</sup>

During cross-examination, the operations specialist chief conceded that his testimony was based on the AWOL offenses. He stated, however, that his opinion was also based upon reports he had received about the accused's performance of duty and on his personal observations of the accused's performance of duty.

On redirect, the trial counsel attempted to "fix" the rehabilitative potential foundation so that it would not violate the requirements of *Ohrt*. The witness stated that his opinion was also based upon the fact that the accused had been involved in an alleged larceny of an automobile. The witness had learned of the alleged larceny by reading a Naval Investigative Service report.<sup>98</sup> The defense counsel objected to this testimony (hearsay/uncharged misconduct). The trial counsel responded that the evidence was offered only to show the true basis of the witness's opinion after it had been attacked on cross-examination. The military judge allowed the testimony.<sup>99</sup>

During sentencing argument, the trial counsel asserted that the alleged larceny of the automobile and the earlier testimony (that had been ruled inadmissible) about a "fight" in which the accused was involved "picture an

individual who does not have potential for future service."<sup>100</sup>

The Court of Military Appeals held that the operations specialist chief's foundation testimony about the alleged larceny of the automobile was inadmissible as hearsay and uncharged misconduct.<sup>101</sup> Additionally, the court recognized that Military Rule of Evidence 403 would normally prohibit this evidence because it is more prejudicial than probative. The court noted that there is a fine line between attempting to use uncharged misconduct evidence to support a rehabilitative potential opinion and using it to establish that the accused is a "bad person." The Court of Military Appeals held that this line was impermissibly crossed when the trial counsel used this inadmissible evidence in his sentencing argument as a rationale for a bad conduct discharge.<sup>102</sup>

To avoid these hearsay and uncharged misconduct problems, the Court of Military Appeals, citing *Ohrt*, again recommended that the foundation for rehabilitative potential opinion be established as an offer of proof.<sup>103</sup> Using either an offer of proof or an article 39a session to establish the *Ohrt* foundational requirements avoids hearsay objections. Additionally, these methods ensure that the evidence is earmarked as the basis for an opinion (and not as substantive evidence of uncharged misconduct which cannot be argued on sentencing). Article 39a sessions and offers of proof will ensure that the "fine line" established by *Ohrt* is not crossed.

#### *United States v. Gunter*<sup>104</sup>

In *Gunter* the accused pleaded guilty to one absence without leave and one wrongful use of cocaine. At an article 39(a) session, the trial counsel informed the military judge that he intended to call the head of the base drug and alcohol abuse control program to testify about the accused's rehabilitative potential per R.C.M. 1001(b)(5). The military judge ruled that he would not allow the testimony during the government's case-in-chief because of the drug and alcohol control program's confidentiality rules.<sup>105</sup>

<sup>93</sup> *Id.* at 307 n.6 (majority opinion notes that the witness was never allowed to provide the foundation for the opinion). *But see Ohrt*, 28 M.J. at 308 (Sullivan, J., dissenting) (transcript from the record of trial provides that the defense counsel waived any objection to the foundation).

<sup>94</sup> See also *United States v. Nixon*, 29 M.J. 505, 507 (A.C.M.R. 1989) (R.C.M. 1001(b)(5) rehabilitative potential evidence held inadmissible because the appellate court cannot determine from the record if there is evidence—besides that held inadmissible—that forms a proper foundation).

<sup>95</sup> *Ohrt*, 28 M.J. at 307 n.6.

<sup>96</sup> 28 M.J. 470 (C.M.A. 1989).

<sup>97</sup> *Id.* at 471.

<sup>98</sup> *Id.* at 472-73.

<sup>99</sup> *Id.* at 473-74.

<sup>100</sup> *Id.* at 474.

<sup>101</sup> See *United States v. Wingart*, 27 M.J. 128 (C.M.A. 1988).

<sup>102</sup> *Brown*, 28 M.J. at 474.

<sup>103</sup> *Id.* In *Brown*, although the Court of Military Appeals again recommended using an offer of proof to establish the foundation for rehabilitative potential evidence, the court failed to mention using an article 39a, UCMJ session. As is noted in *Beware of Rehab Potential Testimony*, The Dicta, 10 Aug. 1989, at 78, "We suggest caution in accepting offers of proof because they often reflect only wishful thinking by counsel. A good time to review the foundation may be while the members are deliberating on findings." This advice appears prudent.

<sup>104</sup> 29 M.J. 140 (C.M.A. 1989).

<sup>105</sup> *Id.* at 141-42.

After the accused presented affidavits, character witnesses, and his own unsworn testimony that he was a candidate for rehabilitation and retention, the government again requested permission to call the head of the base drug and alcohol abuse program for rehabilitative potential testimony. The military judge allowed the opinion testimony as rebuttal.

On appeal, the defense argued that the rehabilitative potential opinion was inadmissible because the foundation for the opinion was based impermissibly upon appellant's drug rehabilitation file.<sup>106</sup>

The Court of Military Appeals held that this "[e]xpert testimony about appellant's chances of successfully overcoming his drug addiction, in light of his case history, is exactly the sort of statement envisioned in *Ohrt* and R.C.M. 1001(b)(5)."<sup>107</sup>

The record established that the expert witness had reviewed the accused's drug rehabilitation file regarding the accused's "progress in the rehabilitation program, including notes about his character, his efforts at rehabilitation, his determination to be rehabilitated, and other information relevant to his becoming drug free."<sup>108</sup>

*Gunter* highlights three concepts of rehabilitative potential evidence:

1. The government must establish a thorough foundation for rehabilitative potential evidence. Because this trial counsel provided a thorough foundation, the appellate court was able to determine that the witness had a rational basis for the opinion.<sup>109</sup>
2. The basis for a rehabilitative potential opinion might not become available until the defense presents its case.<sup>110</sup>
3. The *Ohrt* foundational requirements apparently apply to both expert and lay witnesses.<sup>111</sup> The Military

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 142.

<sup>108</sup> *Id.* at 141.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 142. Once the accused introduced evidence on his rehabilitative potential, the government could release information from the accused's drug rehabilitation file for impeachment or rebuttal. This evidence was the foundation of the witness's rehabilitative potential opinion.

<sup>111</sup> *Id.* at 141-42.

<sup>112</sup> Mil. R. Evid. 703 states:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made know to the expert, at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

<sup>113</sup> Mil. R. Evid. 701 (this foundation is very similar to the R.C.M. 1001(b)(5) *Ohrt* foundation).

<sup>114</sup> *Ohrt*, 28 M.J. at 304.

<sup>115</sup> 29 M.J. 768 (A.C.M.R. 1989).

<sup>116</sup> *Id.* at 770.

<sup>117</sup> *Id.* at 769.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> 22 M.J. 294 (C.M.A. 1986) (rehabilitative potential evidence cannot be based solely upon the charged offenses).

Rules of Evidence define different foundational requirements for *expert* and *lay* opinion testimony. *Experts* can rely on facts "made known to the expert" that are "of a type reasonably relied upon by experts in the particular field in forming opinions."<sup>112</sup> *Lay witnesses* (the members of the chain of command who come to court to testify about the accused's rehabilitative potential) must have an opinion "rationally based on the perception of the witness."<sup>113</sup> Nonetheless, in *Gunter* the Court of Military Appeals tested the basis of the expert rehabilitative potential opinion using the "rational basis" test of *Ohrt*. It appears as though all R.C.M. 1001(b)(5) witnesses must satisfy the lay witness "rationally based" opinion test.<sup>114</sup>

#### *United States v. Stimpson*<sup>115</sup>

Private First Class (PFC) Stimpson pleaded guilty to one specification of larceny. During the presentencing phase of trial, the government asked three noncommissioned officers the following question: Does PFC Stimpson have "the potential for further productive service in the Army?"<sup>116</sup> All three witnesses answered in the negative.<sup>117</sup> All three witnesses testified that they based their opinions on PFC Stimpson's "marginal duty performance and his poor attitude."<sup>118</sup>

During cross-examination, one of these three noncommissioned officers, Sergeant First Class (SFC) Brown, admitted making an earlier statement that "he would not want Audie Murphy in his platoon if Audie Murphy was a thief."<sup>119</sup> Seeking to clarify his opinion, SFC Brown provided that he had been PFC Stimpson's platoon sergeant for six to seven months and had observed PFC Stimpson's duty performance on a daily basis. With this as the foundation, the military judge denied the defense counsel's motion to strike SFC Brown's testimony as violative of *United States v. Horner*.<sup>120</sup>

On appeal, PFC Stimpson first attempted to challenge the testimony of SFC Brown. The appellant alleged that

SFC Brown's testimony was impermissibly based solely on the seriousness/nature of the offense.<sup>121</sup> The A.C.M.R. held that a rehabilitative potential witness can weigh "the nature, circumstances, and impact of the accused's offenses, together with his knowledge of the accused's character and duty performance, when deciding the question of rehabilitative potential."<sup>122</sup>

The court distinguished this platoon sergeant's testimony from that of a witness who views the offense(s) as so serious that the witness is either unwilling or is unable to go beyond them and consider the *Ohrt* factors when determining rehabilitative potential.<sup>123</sup> As a result, SFC Brown's testimony met the first two requirements of *Ohrt*.

As a second appellate issue, PFC Stimpson challenged the testimony of the three noncommissioned officers as exceeding the scope of proper rehabilitative potential testimony (the third requirement of *Ohrt*). Private First Class Stimpson alleged that the government's question was a "euphemism" designed to improperly elicit from the witnesses whether or not they believed a punitive discharge was appropriate.

The A.C.M.R. agreed with the appellant. The court held that the government's question whether the accused had "the potential for further productive service in the Army" was designed to improperly urge a punitive discharge. In footnote 2, the A.C.M.R. provided that the Court of Military Appeals in *Ohrt* held that it is impermissible to have a witness comment on a soldier's rehabilitative potential for future service in an R.C.M. 1001(b)(5) question.<sup>124</sup> The A.C.M.R. provided the exact question that can be asked of R.C.M. 1001(b)(5) witnesses: "In your opinion, does the accused have rehabilitative potential?"<sup>125</sup> The answer must be a simple yes or no.

### Conclusion

The appellate courts have placed severe constraints on the use of R.C.M. 1001(b)(5) rehabilitative potential testimony. The courts have focused on six general rules:

1. Counsel must ensure that only witnesses with rational bases for their opinions testify.<sup>126</sup>
2. Counsel must ensure that witnesses provide the proper *Ohrt* foundation (Does the witness possess "suffi-

cient information and knowledge about the accused—his character, his performance of duty as a service member, his moral fiber, and his determination to be rehabilitated?").<sup>127</sup>

3. Counsel should establish the *Ohrt* foundations during article 39a sessions or through offers of proof (with article 39a sessions being the preferred method).<sup>128</sup>

4. Counsel must not argue foundational evidence beyond its limited admissibility.<sup>129</sup>

5. Whether the R.C.M. 1001(b)(5) witness is an expert or a lay witness, counsel apparently must comply with the *Ohrt* foundational requirements.<sup>130</sup>

6. When asking the rehabilitative potential question, counsel must limit the scope of the question to: "In your opinion, does the accused have rehabilitative potential?"<sup>131</sup>

Rehabilitative potential evidence is extremely influential. Abiding by these six guidelines will ensure that it is also equitable. CPT Cuculic.

## Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally-published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; submissions should be sent to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

### Military Law Review Legal Assistance Symposium Issue

*The Military Law Review* will publish the Third Legal Assistance Symposium issue in Spring 1991. This entire issue will be dedicated to articles addressing topics relevant to the delivery of legal assistance services to members of the military community.

Legal assistance attorneys and other members of the JAG Corps are invited to prepare and submit articles for publication in this issue on any legal assistance topic of

<sup>121</sup> *Stimpson*, 29 M.J. at 769 (The argument being that if SFC Brown would not want even Audie Murphy back, SFC Brown must be basing his rehabilitative potential opinion solely upon the seriousness/nature of the offense).

<sup>122</sup> *Id.* at 769. See also *United States v. Horner*, 22 M.J. 294 (C.M.A. 1986); *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1988).

<sup>123</sup> *Stimpson*, 29 M.J. at 769-70.

<sup>124</sup> *Ohrt*, 28 M.J. at 304-05.

<sup>125</sup> *Stimpson*, 29 M.J. at 770 n.2.

<sup>126</sup> *Ohrt*, 28 M.J. at 304.

<sup>127</sup> *Id.*

<sup>128</sup> See note 103.

<sup>129</sup> *Brown*, 28 M.J. at 474.

<sup>130</sup> *Gunter*, 29 M.J. at 141.

<sup>131</sup> *Stimpson*, 29 M.J. at 770 n.2.

their choice. Articles may address legal issues in such areas as family law, consumer law, wills and estate planning, tax, and real estate. Additionally, we seek articles that discuss computers, deployment preparation, office management, and professional responsibility.

Articles should be sent to The Judge Advocate General's School, ATTN: JAGS-DDL, Charlottesville, Virginia, 22903-1781. The deadline for receipt is 1 January 1991.

The point of contact for the legal assistance symposium issue is MAJ Bernard P. Ingold. He can be reached at (804) 972-6359.

### Survivor Benefits

#### *Congress Changes the Survivor Benefit Plan*

Congress has made several significant changes to the Survivor Benefit Plan (SBP) in the Military Survivor Benefit Improvement Act of 1989.<sup>132</sup> Military personnel will benefit from the Act because it reduces the cost of participating in the plan and amends present law to enable retirees to increase coverage for spouses.

Before March 1, 1990, the cost of providing for spousal coverage under the Survivor Benefit Plan will be determined using a three-step process.<sup>133</sup> First, the retiree selects a base amount anywhere from \$300.00 up to full retired pay. Second, the first \$324.00 of this amount, sometimes referred to as the "low cost basis," is multiplied by 2.5%. The final step in the cost computation is to multiply the remainder over \$324.00 up to the full base amount by 10%. The results of these two calculations added together are the retiree's cost.

The new amendments to the plan provide an alternative cost computation for spousal coverage that involves a two-step process. First, the retiree will select a base amount from \$349.00 up to full retired pay.<sup>134</sup> In the second step, the retiree will multiply the entire base amount selected by the flat rate of 6 1/2%, and this amount will be the retiree's cost. There is no "low cost basis" under this alternative computation.

The alternate cost computation should benefit most soldiers who select high base amounts. For example, assume that a retiree desires spousal coverage with a base amount of \$2,000.00. Under the present three-step formula, the cost would be \$175.70. The new formula, however, reduces the cost to only \$130.00.

The new cost formula will, however, increase the overall cost for lower ranking soldiers or for soldiers selecting a low base amount. The new Act allows these soldiers to select the alternative three-step cost computation if they were in the service before the effective date of the legislation, 1 March 1990. Thus, the cost for SBP coverage for these soldiers will be based on the alternative computation that results in a more favorable cost.

The new amendments to the SBP Plan do not affect the computation for determining costs to obtain coverage for children only and natural persons with insurable interest. The cost for naming children as beneficiaries continues to be based on actuarial cost formulas, and the cost for natural person coverage is 10% of the base amount selected plus an extra 5% for every 5 years the beneficiary is younger than the retiree.

One of the biggest criticisms of the SBP Plan has been the automatic reduction of the spousal annuity from 55% of the base to 35% of the base when the spouse reaches age 62. This two-tiered system became effective on 1 March 1986 and applies to all those who became retirement eligible after 1 October 1985.

The 1989 Act introduces a new form of coverage, entitled the Supplemental Survivor Benefit Plan, to offset the effects of the two-tiered reduction.<sup>135</sup> For increased cost, retirees will now be able to obtain a supplemental annuity to provide a flat 55% annuity to a spouse with no social security offsets or automatic reductions.

The election to participate in the Supplemental Survivor Benefit Plan is purely voluntary.<sup>136</sup> Although retirees may not be ordered to cover former spouses under the new plan, they may voluntarily elect to do so.<sup>137</sup> Like other forms of SBP coverage, however, once the election to participate is made, it is irrevocable.<sup>138</sup>

The cost for providing the supplemental coverage will be based on the age of the participant and will be in accordance with accepted actuarial principles.<sup>139</sup> Reductions from the retired pay of participants in the program will be suspended if the spouse is no longer eligible due to death or divorce.

The new Act contains a one-year open enrollment period, beginning on 1 October 1990, for retirees who have not elected to participate in the Survivor Benefit Plan.<sup>140</sup> During this open enrollment period, eligible

<sup>132</sup> Military Survivor Benefits Improvement Act of 1989, Pub. L. No. 101-189, \_\_\_\_\_ Stat. \_\_\_\_\_ (1989) [hereinafter 1989 Act].

<sup>133</sup> *Id.* (to be codified at 10 U.S.C. § 1452).

<sup>134</sup> The minimum amount that can be selected under the new revisions will increase from \$300.00 to \$349.00.

<sup>135</sup> 1989 Act § 1456.

<sup>136</sup> 1989 Act § 1458(a).

<sup>137</sup> 1989 Act § 1459. The retiree may voluntarily agree to provide supplemental coverage for a former spouse in a written agreement. If the retiree thereafter refuses to make the election in accordance with the agreement, the retiree will nevertheless be deemed to have made the election by the service.

<sup>138</sup> 1989 Act § 1456(f).

<sup>139</sup> 1989 Act § 1460(b).

<sup>140</sup> 1989 Act § 1406.

retirees will be given the opportunity to participate in the standard SBP program and in the Supplemental Survivor Benefit Plan.

The open enrollment period also gives those retirees currently participating in the SBP Program an opportunity to change their coverage. Retirees participating in the SBP Program at a reduced base amount may elect to increase coverage and to participate in the Supplemental Survivor Benefit Plan. Moreover, retirees who have selected children coverage will be given the opportunity to select spousal coverage under the standard and supplemental programs. MAJ Ingold.

#### *Hikes in Veterans' Benefits Announced*

The Department of Veterans' Affairs has announced cost of living increases in a number of benefits.<sup>141</sup> These rate adjustments are based on the 4.7% rise in the Consumer Price Index during the one-year period ending on 30 September 1989.

The adjustments will increase the monthly payments made by the VA under the Dependency and Indemnity Compensation (DIC) program. The rates of DIC payments to surviving spouses for 1990, which are based on the deceased soldier's rank at the time of death, are as follows:

SMA - \$831	W4 - \$809	010 - \$1,446
E9 - 770	W3 - 742	09 - 1,318
E8 - 737	W2 - 764	08 - 1,229
E7 - 698	W1 - 714	07 - 1,121
E6 - 666		06 - 1,038
E5 - 651		05 - 920
E4 - 634		04 - 834
E3 - 597		03 - 789
E2 - 581		02 - 737
E1 - 564		01 - 714

Dependency and Indemnity Compensation payments to surviving spouses will increase if the deceased soldier is survived by children. To qualify for this benefit, the children must be unmarried and under age 18, or under age 23 if in school. The 1990 rate for each child under age 18 is \$65.00. This amount increases to \$169.00 if the child is disabled. For children who are between the ages of 18 and 23 and in school, the 1990 amount is adjusted to \$144.00.

Dependency and Indemnity Compensation payments to surviving children will also increase. The monthly amount for 1 child in 1990 is \$284.00, for 2 children —

\$409.00, for 3 children — \$529.00, and \$105.00 for each additional child.

Dependency Indemnity Compensation will also be paid to parents if they are below certain income levels. These income levels increase in 1990 to \$7,697 if one parent survives and to \$10,350 if two parents survive and live together. The maximum 1990 monthly DIC payment for one surviving parent is \$318.00. For two surviving parents, it is \$214.00 for each parent.

The VA has also proposed to increase the amounts paid under the Educational Assistance Test Program.<sup>142</sup> This proposed adjustment is based on the 6% rise in the average actual cost of attending public institutions of higher learning. The maximum annual limit of educational assistance for qualifying students in 1990 is \$1753.00, and the monthly subsistence allowance for full-time students will go up to \$437.00. The VA has proposed to make these rate hikes retroactive to 1 October 1989.

The VA also has announced an increase in the payment provided to reimburse survivors of soldiers for the cost of non-government headstones or markers. The payment rate is based on the actual average cost of government-furnished markers. Because these costs have increased, the reimbursement rate for fiscal year 1990 will be adjusted upward to \$85.00.

Cost of living adjustments have also been made in the pension programs administered by the VA. All payments to veterans receiving VA pensions should reflect the 4.7% increase in the Consumer Price Index. MAJ Ingold.

#### **Tax Note**

##### *Two More States Rule That Courts Can Allocate Dependency Exemptions*

A much-litigated issue under the 1984 Domestic Relations Tax Reform Act<sup>143</sup> is whether courts are precluded from ordering a custodial parent to execute a waiver of his or her right to claim a federal tax dependency exemption. Although state courts have split on the issue, two more states, Connecticut<sup>144</sup> and Utah,<sup>145</sup> have joined the ranks of states adopting the view that state courts can order the parent to execute a waiver.

The 1984 Domestic Relations Tax Reform Act amended section 152 of the Code<sup>146</sup> to simplify the rules regarding which separated or divorced parent will be entitled to claim a dependency exemption for a child. Section 152 provides that the custodial parent is entitled

<sup>141</sup> 54 Fed. Reg. 45,887 (1989).

<sup>142</sup> 54 Fed. Reg. 42,961 (1989).

<sup>143</sup> The Domestic Relations Tax Act is Subtitle B of the Deficit Reduction Act of 1984. Pub. L. No. 98-369 §§ 421-426, 98 Stat. 494, 793-805 (codified at 26 U.S.C.).

<sup>144</sup> *Serrano v. Serrano*, 213 Conn. 1 (1989).

<sup>145</sup> *Motes v. Motes*, Utah Ct. App., No. 880015-CA (Nov. 16, 1989).

<sup>146</sup> I.R.C. § 152 (West Supp. 1989).

to the exemption unless the custodial parent executes a waiver to the other parent.<sup>147</sup>

The custodial parents in *Serrano*<sup>148</sup> and *Motes*<sup>149</sup> argued that the amendment to section 152 evidenced a federal purpose to give a tax benefit to the custodial parent that can be conferred upon the other parent only if the custodial parent waives the right. They pointed out that because the section explicitly defines certain exceptions as to when a noncustodial parent may be awarded the exemption, state courts may not allocate the exemption to non-custodial parents unless one of the exceptions apply. Courts in several states have accepted this argument.<sup>150</sup>

Both the Connecticut court in *Serrano* and the Utah court in *Motes* refused to follow this approach after conducting an extensive analysis of the law in this area. The courts noted that state courts have been allocating the exemption for decades. They opined that if Congress desired to change this practice, it would have explicitly prohibited states from allocating the exemption. The courts also looked to the legislative history behind the section 152 amendments. They determined that the overriding congressional purpose in making the changes was to free the IRS from the burdensome administrative functions associated with determining which parent furnished more support.

The courts in *Serrano* and *Motes* follow the approach taken by most jurisdictions that have considered the issue.<sup>151</sup> If applied appropriately, this approach stands to benefit both parties. It allows courts to order the non-custodial parent to increase support payments in exchange for the tax benefit of claiming a dependency exemption.

The court in *Motes* perceptively noted that the order to execute a waiver of the dependency exemption should be made contingent upon the receipt of support from the non-custodial parent. This provides an economic incentive to the non-custodial parent to provide timely and adequate support. MAJ Ingold.

## Family Law Note

### Interspousal Torts

Recent cases<sup>152</sup> and articles<sup>153</sup> have highlighted tort liability as an important and growing development in domestic relations practices. In jurisdictions that have abolished interspousal immunity,<sup>154</sup> legal assistance attorneys must be cognizant of collateral tort claims when counselling clients about separation and divorce. They also should understand the possible preclusive effects of failing to assert a tort cause of action in conjunction with the divorce action.

The bitter feelings, anger, and desire for revenge that sometime precede marital dissolutions can lead to actionable conduct. For example, domestic violence may serve as a cause of action for assault and battery as well as grounds for divorce (or at least a reason for pursuing a divorce). Similarly, clients often relate details of mental and verbal abuse that may, in extreme cases, constitute intentional infliction of emotional distress.<sup>155</sup>

Marital actions also can provide fertile grounds for torts that are not so readily apparent. Consider, for example, negligence actions between husbands and wives. These most often are asserted in the context of automobile accident injuries, but any negligent injury can serve as grounds for recovery of damages. Of course, in ongoing marriages an injured spouse usually declines to pursue a negligence action against the tortfeasor spouse unless insurance will pay the damages. When parties contemplate divorce, however, it becomes important to explore possibilities of tort liability, whether or not insurance exists.

Fraudulent inducement to marry can constitute a basis for recovering damages as well. Such cases typically arise when one party knew that a pending divorce was not yet final, but falsely represented that he or she had the capacity to marry. In some jurisdictions, moreover, a plaintiff need not prove intentional deception; an action may lie if the bigamist merely *should have known* of the incapacity. Damages in these cases may include compen-

<sup>147</sup> The general rule giving the custodial parent the right to claim the exemption also does not apply if a pre-1985 decree gives the other parent the right to the exemption. The rule is also inapplicable if a multiple support agreement exists. I.R.C. 152(e) (1982 & Supp. V 1987).

<sup>148</sup> 213 Conn. 1 (1989).

<sup>149</sup> Utah Ct. App., No. 880015-CA (Nov. 16, 1989).

<sup>150</sup> See, e.g., *Holly v. Holly*, 547 So. 2d 192 (Fla. Dist. Ct. App. 1989); *In re Davidson*, 540 N.E.2d 641 (Ind. Ct. App. 1989); *Varga v. Varga*, 434 N.W.2d 152 (Mich. Ct. App. 1989); *Gerardy v. Gerardy*, 406 N.W.2d 10 (Minn. Ct. App. 1987); *Gleason v. Michlitsch*, 728 P.2d 965 (Or. Ct. App. 1986); *Josey v. Josey*, 351 S.E.2d 891 (S.C. 1986); *Brandriet v. Larson*, 442 N.W.2d 455 (S.D. 1989); *Davis v. Fair*, 707 S.W.2d 711 (Tex. Ct. App. 1986).

<sup>151</sup> *Lincoln v. Lincoln*, 746 P.2d 13 (Ariz. Ct. App. 1987); *In re Einhorn*, 533 N.E.2d 29 (Ill. App. Ct. 1988); *Hart v. Hart*, 774 S.W.2d 455 (Ky. Ct. App. 1989); *Wassif v. Wassif*, 551 A.2d 935 (Md. Ct. Spec. App. 1989); *Bailey v. Bailey*, 540 N.E.2d 187 (Mass. App. Ct. 1989); *In re Milesnick*, 765 P.2d 751 (Mont. Super. Ct. 1988); *Gwodz v. Gwodz*, 560 A.2d 85 (N.J. App. Div. 1989); *Fleck v. Fleck*, 427 N.W.2d 355 (N.D. Sup. Ct. 1988); *Hughes v. Hughes*, 518 N.E.2d 1213 (Ohio Sup. Ct. 1988); *In re Peacock*, 771 P.2d 767 (Wash. Ct. App. 1989); *Cross v. Cross*, 363 S.E.2d 449 (W. Va. Sup. Ct. App. 1987); *Pergolski v. Pergolski*, 420 N.W.2d 414 (Wis. Ct. App. 1988).

<sup>152</sup> E.g., *Chiles v. Chiles*, 779 S.W.2d 127 (Tex. Ct. App. 1989).

<sup>153</sup> E.g., Spector, *Marital Torts*, 15 Fam. L. Rptr. 3023 (1989).

<sup>154</sup> See *Burns v. Burns*, 518 So. 2d 1205 (Miss. 1988), for a fairly recent listing of interspousal immunity cases. Thirty-nine states have abolished the immunity completely, and eight others have limited its applicability. Spector, *supra* note 153, at 3023.

<sup>155</sup> For a discussion of this tort, see Restatement (Second) of Torts § 46 (1976).

sation for mental distress, as well as provable out-of-pocket losses.

Mistrust can lead to yet another tort action. Monitoring and recording telephone conversations is a very effective method of gathering evidence in a divorce case, but it also can be illegal. The Omnibus Crime Control and Safe Streets Act of 1968<sup>156</sup> proscribes the unauthorized interception of voice, wire, and electronic communications in a wide variety of circumstances. Courts are split on the Act's applicability in marital settings,<sup>157</sup> but the majority view is that one cannot electronically eavesdrop on his or her spouse's telephone conversations. Case law shows that this prohibition even applies to telephones in a jointly-occupied marital home.

Federal law is not the only source of a cause of action in this area. Some states have statutes which prohibit wiretapping on an even more comprehensive basis than the Act. Victims of illegal wiretaps can obtain injunctions against using information gained through wiretap, and damages are a possible remedy.<sup>158</sup>

Once a tort cause of action has been identified, the next step is determining whether the client wants to pursue the matter. If the primary concern is getting out of the marriage rather than seeking a money judgment (which may be uncollectible in any event), then the client will decline to press the matter. On the other hand, if the client desires to explore the issue, it seems obvious that counsel must exercise caution to preserve litigation options. What may not be so obvious is that the same cautious approach is appropriate when the client is unsure of what to do. Without taking steps to avoid foreclosing the tort action, counsel inadvertently may make the decision for the client.

Assuming the client's interest or uncertainty warrants further research (and also assuming that interspousal immunity has been abolished for the type of tort that the case entails), the next step is to determine whether the state will allow the tort action to be joined with the divorce proceedings. If joinder is allowed, but the client fails to assert the claim, the doctrine of res judicata will foreclose future prosecution of the tort cause of action. On the other hand, some states strongly discourage or disallow such a joinder on the theory that there is no room in a no-fault divorce action for fault-based recoveries.

Res judicata usually occurs in the context of two lawsuits. In matrimonial cases, however, separation agreements may raise an analogous preclusion issue. These agreements typically include language stating that the provisions constitute a settlement of all rights, claims, and obligations between the parties. Obviously, this language can be interpreted to preclude litigation of tort claims that arose before the agreement was executed.<sup>159</sup>

Although res judicata will not be a problem when joinder is disallowed or discouraged, timing of the two actions still can be critical. For example, Utah has a decisional rule that the tort lawsuit must precede the divorce action.<sup>160</sup> In this situation, the injured spouse must decide whether possible recovery on the tort is worth delaying the divorce in order to litigate the matter.<sup>161</sup>

Collateral estoppel can be a concern in these cases as well. While res judicata precludes tort claims that should have been joined with the divorce, collateral estoppel precludes relitigation of issues that previously have been decided by a court. For example, suppose one spouse successfully sues the other for damages, claiming an intentional infliction of emotional distress. In a subsequent divorce action based on mental cruelty, the tortfeasor spouse could be precluded from relitigating the issue of fault. Thus, conduct that was litigated and proven in the tort case could again have an effect on awards of property and support in the divorce action.

In summary, legal assistance attorneys should be aware of the potential for assertion of tort claims by and against their domestic relations clients. When such claims exist, careful coordination of separation agreements and lawsuits can serve to preserve and facilitate, or to frustrate, plaintiff's recovery of damages. MAJ Guilford.

## Consumer Law Note

### Credit Repair Firms

Legal assistance attorneys, particularly those in the southern United States, should pay close attention to the efforts of clients who have been attempting to improve their credit ratings. Two credit repair firms have recently agreed to a consent decree resulting from their activities in so-called "credit repair." The consent decree provides

<sup>156</sup> 18 U.S.C. §§ 2510-2520 (1982).

<sup>157</sup> Compare *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977); *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), cert. denied, 419 U.S. 897 (1974); *Platt v. Platt*, 685 F. Supp. 208 (E.D. Mo. 1988) (cases holding that the Act does not apply to spousal wiretaps in domestic relations matters) with *Kempf v. Kempf*, 868 F.2d 970 (8th Cir. 1989); *Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984); *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976); *Heggy v. Heggy*, 699 F. Supp. 1514 (W.D. Okla. 1988) (cases holding that the Act does prohibit spousal wiretaps).

<sup>158</sup> Anti-wiretap laws can create significant problems for unwary counsel. Plaintiffs should be advised not to employ this technique of information gathering unless a thorough analysis of federal decisions (for the specific circuit where the plaintiff is located) and state laws shows that the practice is locally permissible. See, e.g., *Citron v. Citron*, 722 F.2d 14 (2d Cir. 1983) (client sued for an illegal wiretap after an attorney advised that it would be legal); *Kratz v. Kratz*, 477 F. Supp. 463 (E.D. Pa. 1979) (attorney sued by client's wife for mistakenly advising client that a wiretap was legal; the attorney relied on a case from another circuit and failed to note a controlling case in the local circuit).

Counsel must be equally careful when clients present them with a *fait accompli*. Wiretap tapes should not be reviewed unless the wiretap itself was legal. See, e.g., *Remington v. Remington*, 393 F. Supp. 898 (E.D. Pa. 1975) (law firm sued for reviewing and using illegal wiretap tapes).

<sup>159</sup> *Jackson v. Hall*, 460 So. 2d 1290 (Ala. 1984).

<sup>160</sup> *Noble v. Noble*, 761 P.2d 1369 (Utah 1988).

<sup>161</sup> See Spector, *supra* note 153, at 3029.

for a judgment of 3.5 million dollars against the firms for various misrepresentations concerning the firms' alleged ability to "repair" consumer credit ratings.<sup>162</sup>

In September 1988, the Federal Trade Commission (FTC) charged Nationwide Credit Services, Inc., and A-1 Credit Service, Inc., of New Orleans with falsely and deceptively claiming that they could "improve consumers' credit reports, remove bankruptcies, . . . provide refunds to consumers, and arrange for consumers to receive unsecured credit cards."<sup>163</sup> In particular, the FTC alleged that the firms had been representing that they could improve consumers' credit ratings under the Fair Credit Reporting Act<sup>164</sup> when, in fact, such remedies were not available.<sup>165</sup> Additionally, the FTC alleged that the firms were harassing consumers who reportedly owed them money.

Under the consent decree, these firms are prohibited from making misrepresentations about improving credit

records, misrepresenting rights and remedies under the Fair Credit Reporting Act, misrepresenting and failing to honor their refund policy, misrepresenting that they can arrange unsecured credit for consumers, and using deceptive means to collect debts due from consumers who have contracted to use their services. Unfortunately, the FTC has indicated that it is uncertain whether any of the judgment will ever be collected from the firms. Additionally, the firms did not admit guilt in the consent decree, which was for settlement purposes.

Attorneys with clients who may have been treated improperly by these firms or others like them should contact the FTC<sup>166</sup> as well as local and state consumer protection agencies. Although clients may find it difficult to collect damages from some offenders, legal assistance attorneys can help ensure the firms do not continue their illegal practices. MAJ Pottorff.

<sup>162</sup> Consent Decree (E.D. La. Oct. 18, 1989) reviewed by Bulletin, *Credit Repair Firms to Settle Charges of Deceptive Claims*, Consumer and Commercial Credit, Nov. 13, 1989, at 4 [hereinafter Bulletin].

<sup>163</sup> Bulletin, *supra* note 162, at 5.

<sup>164</sup> 15 U.S.C. §§ 1681 - 1681t (1982 & Supp. V 1987).

<sup>165</sup> As a general rule, credit reporting agencies may not release bankruptcy adjudications more than 10 years old and paid tax liens, accounts charged to loss, criminal arrests, suits and judgments, and other adverse information more than 7 years old, absent consent or a court order. The Fair Credit Reporting Act, however, provides some major exceptions to this rule. If the credit report is for a consumer transaction of \$50,000 or more, for issuance of a life insurance policy for \$50,000 coverage or more, or for employment at a salary of \$20,000 or more, credit reporting agencies may release older information.

<sup>166</sup> Federal Trade Commission, Bureau of Consumer Protection, Division of Credit Practices, Washington, D.C. 20580

## Claims Report

*United States Army Claims Service*

### Claims Automation—Lessons Learned

*Colonel Adrian J. Gravelle*

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*This is the second part of a two-part article about automation at USARCS. The first part appeared in last month's issue of The Army Lawyer.*

#### Lessons Learned

Overall, the conversion from the old DA Form 3 system to an automated system for tort claims and personnel claims has gone very well. But, as with any project of this magnitude, there were some mistakes made and lessons learned.

Perhaps the first lesson learned was that it was necessary to take risks in order to create a new and unique system. The Assistant Judge Advocate General and the Commander, U.S. Army Claims Service, took those risks. In doing so, they broke out of the mold that I have seen all too often in the Army and in civilian business: the urge to study automation *ad nauseam* and to defer action on implementation indefinitely. Various

reasons have been advanced to defer action. Some managers want to await the next round of technology for fear of buying a system that is obsolete before it is up and running. Other managers cannot understand the automation studies, often prepared by civilian consultants who neither understand the mission nor speak the manager's language. I have seen too many of these automation studies, which are normally presented in very large attractive binders and are typically overwhelming in their sheer volume. They are usually written in "computerese," which is incomprehensible to the decisionmakers. Also, most managers fear a technology they do not completely understand, are initially intimidated by technology and the commercial purveyors of it, and fear failure because they cannot predict the impact of computerization on their office. As a result of all of these fears, it is easier to continue to study computerization (which is at least "doing something" in their own minds) than to risk failure.

Another lesson learned is that, despite careful advance planning, the automation of an office will cause major disruptions and backlogs. At USARCS, the initial poor quality of the data caused many disruptions in the orderly processing of claims files at USARCS. These disruptions caused many severe backlogs, especially in the mail room, in the records section, and in the centralized recovery program administered by the Recovery Branch, Personnel Claims and Recovery Division. The disruptions occurred because of the structure of the computer program and because of the need to ensure data integrity. Each individual claims record is electronically constructed to permit data entry only in a certain prescribed sequence, paralleling the steps in the processing of a claim. To ensure data integrity, the USARCS computer program was designed so that each data entry step was built on all previous steps, and each step had to be completed in its proper sequence. Unless all previous data entry steps had been taken, no later data could be entered. For instance, if a field claims office had failed to enter a settlement date and amount paid or had failed to enter the date that the claim was forwarded to USARCS for centralized recovery, no mail room date (which establishes the official receipt for the file at USARCS) could be entered. Without a mail room date, no demands on carriers could be entered and no checks from carriers could be recorded as received or deposited in the bank. Furthermore, for those electronic files that the minicomputer had rejected because of field claims office errors or omissions, there was no place on the system to enter a mail room date. In the computer's "mind" that claim simply did not exist. Further complicating the problem was the fact that very many paper claims files were arriving at USARCS prior to the arrival of the initial submission of the electronic claims records. Again, the minicomputer could not process information for those files until it had the electronic record. Even for those closed claims files that were sent to USARCS for retirement, no processing of the files for retirement could be accomplished until the correct electronic data was in the minicomputer and was completely up to date.

At any given time, we normally have on hand approximately 25,000 active personnel claims files in various stages of carrier recovery action. Because of this large volume, any disruption or interruption in processing these files creates severe problems for us. As a result of this inability to process many open files for carrier recovery and to process many closed files for retirement, large backlogs of additional thousands of claims files awaiting receipt of the electronic record developed in late 1988 and in the first part of 1989. In the process, many files were temporarily "lost" in the large number of boxes of unworkable files. To overcome this problem, we tried many stopgap procedures. None worked. We even tried to enter entire missing claims records from scratch and to enter missing data in existing records. We abandoned this attempt in January 1989 because of the sheer volume of work involved. In January 1989 we established a "file queueing" system whereby the paper claims files received from field claims offices are allowed to sit in limbo for a thirty-day period in order for the complete electronic record to catch up with the paper file. While this queueing system was unacceptable in the

long run, it did prove effective for the short run. In May we were able to cut the waiting time to twenty days, and in June it was reduced to ten days. By July the queue was down to five days, and the backlogs had been virtually eliminated. What ultimately solved the problem was the dramatic improvement in quality of the electronic data because of the hard work of field claims office personnel. Equally important was the hard work of USARCS personnel in eliminating the backlogs that had built up. By July 1989 most of the automated procedures were in place and were working well at USARCS.

Every new system will have unanticipated consequences. Every new program will have bugs and every new system will require modifications to accomplish the intended functions. Training claims personnel and getting them accustomed to new procedures and to a new work flow and cadence takes time.

Keeping personnel informed during the actual transition is of critical importance. In order to prepare the USARCS work force for the conversion from one system to another, the Commander, USARCS, established the USARCS Automation Committee in the Fall of 1987. The committee, chaired by the USARCS Executive, consisted of the key automation personnel and representatives of each branch and division at USARCS. The purpose of the Automation Committee was to keep everyone updated on the many ongoing changes and to identify problems resulting from the conversion. The committee, through the Executive, made recommendations to the Commander, USARCS, regarding solutions to major problems and solved the legion of small day-to-day problems resulting from both the internal automation of USARCS and from automation of the worldwide claims system. The committee met once a week during the early critical months of 1987-88 and once a month after the initial welter of problems began to subside. The members of the automation committee individually and collectively created innovative solutions to the daily problems that arose within USARCS, received questions from field claims offices and puzzled out answers, identified system-wide problems and produced guidance for field claims offices in the form of Claims Automation Bulletins, and produced informational memoranda for the USARCS work force. The work of the Automation Committee was absolutely essential to the success of the automation effort.

I have read somewhere that the average new computer system rarely fulfills all of the manager's expectations and rarely performs all of the functions for which the manager purchased the system. In this sense, the effects of computerization are disappointing. At the same time, however, the average new system will perform a myriad of valuable functions never anticipated by the manager. These unanticipated benefits normally outweigh the disappointments. Further, the computer system's unanticipated beneficial functions are usually discovered by the personnel who actually use the computer full time. These individuals find new and innovative ways for their computer terminals to make their jobs easier. This phenomenon has proven true at USARCS.

A number of functions simply have not proven to be as efficient or as cost effective when done by computer or are beyond the capability of the system. For instance, we found that our word processing system in conjunction with our laser printers would not print addresses on envelopes without additional special equipment and were not efficient for filling out forms, such as purchase requests, efficiency reports, and performance appraisals. We found that we needed a few electric typewriters and a few of our first-generation word processors scattered strategically throughout the work areas to do these simple functions. We also found that with our high-volume carrier recovery correspondence, a pre-printed form letter with the blanks filled in by pen-and-ink was more efficient than using word processors to turn out original typewritten documents. We also found that suggestions and innovations from our typists gave us new ways to use the computers to increase productivity.

For some functions, the hoped-for savings in time and manpower simply did not materialize. Even after all systems were debugged and the system was working well, we needed more time and more personnel to perform the same functions as before. But this is not necessarily bad because automation is producing invaluable claims data and management reports never before available without time-consuming manual calculations supplemented with some educated guesswork.

Organizations beginning the automation process must anticipate the need to restructure the work force, as automation will change the very nature of the work flow. Automation will create more work for some personnel and less work for others. Moving personnel assets around and creating or abolishing positions or whole sections is a possibility that must be faced. Because much of the change in workloads and flow cannot really be anticipated, any changes in the organization must be made after the system is up and running, debugged, and modified. Further, any changes in the organization must be done only after all personnel are fully trained and working comfortably with the new system and after there is a sufficient track record to show where the modifications are needed. Allow the system to adjust and to prove itself for a reasonable length of time before making changes. We reached the point of making management decisions on minor restructuring only after the personnel claims and recovery system had been in operation for almost two years. When implementing a completely new system, be prepared to forfeit good management data for a year or two. The early data during the break-in period is simply not good or complete enough upon which to base sound management decisions. Unless a manager is willing to expend the time and resources to run parallel systems—the old and the new—to ensure that there is no gap in good data, the gap is almost inevitable. Most managers simply do not have the resources to run two systems, nor

is it a good idea anyway. A clean break with the old system seems to me to be essential. It eliminates confusion, and it creates in the work force a need and a willingness to change by eliminating the security blanket of the old system. It also affirms management's commitment to the new system.

USARCS did not attempt to run parallel systems. Because the old DA Form 3 system was antiquated and incomplete and had already begun to fall apart by the mid 1980s, that system was producing very little meaningful, accurate, or timely management data. For USARCS—personnel and resource constraints aside—the decision not to run parallel systems was an easy one. It was more a question of replacing nothing with something. As a result of the sound decision not to run parallel systems, Armywide personnel claims data produced by the computer for FY88 and earlier is highly suspect and not considered reliable by today's standards. Personnel claims data for FY89 is considerably improved, but is still questionable in some respects. The personnel claims data for FY90 is expected to have improved in reliability to the point that we can base major management decisions upon it.

Another lesson learned is that there will inevitably be a large initial increase in work for all personnel. An example is the conversion of old records to new and the correction of errors and omissions in the early computerized claims records. This extra work was difficult and time-consuming for field claims offices. It was equally difficult and time-consuming at USARCS. For example, during one week in September 1988, we shut down all other personnel claims operations and entered data for over nine thousand personnel claims files. The vast majority of these files were open files in various stages of carrier recovery. This lost week of "normal" recovery work disrupted the orderly flow of claims files and caused some backlogs. Some files were temporarily lost because of the volume of claims files on hand. The temporary increase in work and temporary disruption in processing claims are costs of doing business and are a small price to pay to achieve long-term savings and efficiency.

The automation of the Army Claims System has been a management challenge and a challenge for both field claims office personnel and USARCS personnel. While it has caused some disruptions and backlogs, it has gone surprisingly well. All claims personnel who have participated in this massive conversion can be justifiably proud of all of our accomplishments. The system is in place and working well, and the major conversion problems are behind us. What remains is to make minor adjustments to the system and to the claims organization, and for all of us in the claims system worldwide to reap the benefits of everyone's hard work.

## Claims Notes

### Personnel Claims Notes

#### *Recreational Vehicle Lots, Stables, and Boat Marinas*

Many installations have storage lots where soldiers can park recreational or nonoperational vehicles, stables where soldiers can store their riding tack, or marinas where soldiers can moor boats. Inevitably, some property stored at such facilities is stolen, vandalized, or otherwise damaged.

The Personnel Claims Act is a gratuitous payment statute designed to compensate soldiers and civilian employees for losses incident to their service. It is not, however, intended to make the United States a total insurer of a soldier's property.

Claims for losses occurring at recreational and nonoperational vehicle lots, stables, and marinas should be denied whenever soldiers storing property at these facilities have been advised that they are not covered under the Personnel Claims Act and should consider purchasing private insurance or making storage arrangements off-post. Although claims may be paid when soldiers have not received such guidance, these facilities primarily exist as a convenience, and losses of property stored there should normally not be considered losses incident to service.

Field claims offices should ensure that commanders post signs at such facilities informing users that the Personnel Claims Act will not compensate them for loss or damage to personal property stored there and that they should consider purchasing private insurance. Where appropriate, registration or waiver forms that soldiers sign should be redrafted to clearly state this. Mr. Frezza.

#### *Claims for Inherited and Used Property*

Claimants will sometimes claim the catalogue price for new items to replace missing or destroyed items that were inherited or acquired used. Frequently, they will have no real idea when the item was manufactured or originally purchased.

As a rule of thumb, and in the absence of specific evidence to the contrary, an item acquired used may be deemed to be five years old at the time the claimant acquired it. This rule should, of course, be modified if application will result in an injustice in a particular instance. In modifying the rule, consideration should be given to the useful life of the item in question. Consideration should also be given to reducing or increasing the depreciation rate if the item has been subjected to less than average or more than average usage.

In Germany many soldiers acquire items that German families leave out for trash pickup; this practice is known as "junking." A small "fair and reasonable" (F&R) award is normally appropriate for loss or damage to such property. Mr. Frezza.

#### *Update on Greek Restrictions on Resale of POV's*

On 28 March 1989, the Greek Ministry of Finance rescinded the portion of Decision No. D.247/13 that

effectively made it impossible for a soldier stationed in Greece to transfer a POV more than six years old to a new owner (see Claims Note, *Greek Restrictions on Resale of POV's*, The Army Lawyer, Oct. 1989, at 42). The legal advisor to the Office of Defense Cooperation (Greece), MAJ Charles T. Ketchel, Jr., USAF, has advised us that the Greek government is no longer restricting the transfer of such vehicles to other members of the U.S. military force.

For this reason, only claims from soldiers who left Greece between March 1988 and March 1989 and were forced to turn in European-specification POV's more than six years old may be considered payable as unjust confiscations within the meaning of paragraph 11-4c(1), AR 27-20. Mr. Frezza.

#### *Matching Sterling Silver*

Individual pieces of sterling silver from discontinued patterns are occasionally missing from shipments. To avoid replacing an entire set, claimants should be directed to firms that can replace such pieces.

Beverly Bremer Silver Shop, 3164 Peachtree Rd. NE, Dept SM, Atlanta GA 30305, is one firm which specializes in replacing missing silver flatware and hollowware. Their telephone number is (404) 261-4009.

USARCS is interested in continuing to publish the names of firms that specialize in matching pieces from discontinued china, crystal, or silver patterns. We encourage anyone who knows of any such firms to write to U.S. Army Claims Service, ATTN: JACS-PC, Fort George G. Meade, MD 20755-5360, and provide us with the name, address, and telephone number. Mr. Frezza.

#### *Completing the DD Form 1844 on Reconsideration*

Field claims personnel in a few offices have inadvertently gone to great lengths to create additional work for themselves and for the Claims Service in adjudicating requests for reconsideration, including requests for items that were not claimed previously (so-called "supplemental" claims).

On reconsideration, claims personnel should never alter or erase information previously entered on the DD Form 1844 (List of Property and Claims Analysis Chart). Nor should claims personnel reenter line items from the original DD Forms 1844 on a newly created DD Form 1844 to show the action taken on reconsideration. These methods are time-consuming, and they make it difficult to determine what action was taken originally.

The Claims Service requests that claims personnel simply enter changes made on reconsideration onto the original DD Form 1844 above the information previously entered, with the notation "On Reconsideration" entered in any free space on the line. Such entries should be made in red or some other color to clearly distinguish the action taken on reconsideration from the action taken originally.

For example, if a claimant requested reconsideration and substantiated payment of an additional \$25 sales tax

on a vase on line 3, claims personnel would enter in red ink "+ \$25" in the "Amount Claimed" column, "Amount Allowed" column, and "Total Amount Allowed" block; "On Reconsideration" somewhere in one of the exceptions columns; and "\$25 Sales Tax AC" in the "Remarks" column. This would make it apparent at a glance what action was taken on reconsideration.

"Supplemental" claims for items never claimed previously are also treated as requests for reconsideration, but they present slightly different problems. Often, claims personnel will not indicate which items were claimed on reconsideration.

If there is sufficient space on the original DD Form 1844 to enter the additional items, simply have the claimant add them at the bottom. Claims personnel should have the claimant separate these supplemental items from the items originally claimed with the words "Supplemental Claim" and the date reconsideration was requested. If there is no room for the supplemental items on the original form, have the claimant complete a new DD Form 1844; however, the additional form should clearly be marked with the words "Supplemental Claim" and the date.

Note that if a supplemental claim for loss or damage in shipment is presented within 75 days of delivery, the claims office should immediately dispatch a supplemental DD Form 1840R listing the additional items; otherwise, the claims office should consider deducting lost potential carrier recovery. Mr. Frezza.

## Affirmative Claims Note

### *Federal Medical Care Act Assertions Based On a Soldier's Tort Liability*

Recovery judge advocates must exercise great care before attempting assertion or collection action for the costs of medical care rendered when a soldier or civilian employee or one of their dependents is the third party tortfeasor. AR 27-20, paragraph 14-13d(2). A cautious approach assures equal treatment for all service members. The following general rules apply:

a. If the tortfeasor is a soldier, employee, or dependent who injures himself or herself, no claim is asserted for medical care provided, whether or not the person has liability insurance.

b. If, however, the tortfeasor is a soldier, employee, or dependent who injures another, is grossly negligent, and has liability insurance or medical payment insurance coverage, a claim is asserted and recovery pursued to the extent of the liability policy coverage.

c. If the tortfeasor is a soldier, employee, or dependent who injures another and has no liability insurance, no claim is asserted unless "gross negligence or wanton misconduct" can be shown. Prior approval for assertion must be obtained from Affirmative Claims Branch (JACS-PCA). Ms. Brackney.

## Labor and Employment Law Notes

*OTJAG Labor and Employment Law Office,  
FORSCOM Staff Judge Advocate's Office,  
and TJAGSA Administrative and Civil Law Division*

### Civilian Personnel Law

#### *Proving Nexus Through Misconduct Involving Another Agency*

In *Department of the Army and Joan Holzman and AFGE, Local 900*, FMCS No. 89-00306 (Nov. 29, 1989), an arbitrator decided that the Army could not discipline an employee for submitting a falsified employment application (SF-171) to another agency. HHS initially selected Holzman for a position, but rescinded the action after talking to her Army supervisor. We have asked OPM to seek reconsideration of the award pursuant to 5 U.S.C. § 7703(d).

#### *Presumptive Nexus*

Although egregious off-duty misconduct may raise a presumption of nexus, the MSPB held in *Moten v. United States Postal Serv.*, 1989 WL 145465 (Nov. 6, 1989), that no presumption was raised by a conviction for off-duty statutory rape that resulted in probation. Although the crime was a felony, it was listed in the least serious class of state felonies and, despite the

agency's contention that co-workers would refuse to work with Moten, the only negative comment came from a secretary who had no contact with Moten.

#### *Communications Outside the Agency*

Appellant withdrew his appeal of his removal in return for cancellation of the action and removal of references to the removal from his personnel file. The agreement designated a Mr. Becham to receive employment inquiries and to refer only to material in the personnel file in responding. Appellant was rejected by a local transit authority based on a negative reference from a former supervisor in the agency to whom the transit authority's inquiry was routed. A subsequent inquiry went to Mr. Becham, who responded positively and advised that only he was authorized to respond. Although the negative response was inadvertent, the board found a breach of the agreement and rejected the argument that appellant had a duty to ensure that all employment inquiries went to Mr. Becham.

There was no relief for the appellant, however, because the board could not pay him the wages he would

have received had he gotten the job and not requested cancellation of the settlement agreement and reinstatement of the appeal of the original removal. *Miller v. Dep't of Health & Human Servs.*, 41 M.S.P.R. 385 (1989).

The Privacy Act exemption for disclosures to Congress does not protect an agency's release of information concerning EEO activity to individual members of Congress. In *Swenson v. United States Postal Serv.*, 1989 WL 145353 (9th Cir. Dec. 4, 1989), an employee wrote a senator and a representative about alleged misconduct by her supervisor. In response, the agency released information about EEO activity. The court, reversing summary judgment, held that the Privacy Act exemption applies only to communications with Congress collectively or with its committees.

In another Privacy Act case, *Waters v. Thornburgh*, 888 F.2d 870 (D.C. Cir. 1989), the court held that under the particular facts of the case, it was improper to contact third parties for information instead of soliciting the information from the individual. The Act requires that personal information be collected to the greatest extent practicable from the individual. Waters asked for leave to take a bar exam. Believing he had falsified an earlier excused absence, the agency suspected he did not take the exam. The agency called state bar examiners, who confirmed that he had. Although some investigations could be compromised by soliciting information from the employee first, here Waters had an interest in providing exculpatory information, and he could not have interfered with subsequent inquiries to the bar examiners.

#### *Prior Disciplinary Actions*

In another case in which we have asked for reconsideration, *Matlock v. Dep't of the Army*, 1989 WL 147752 (Nov. 21, 1989), the board held that an agency cannot rely solely on a record of personnel action (SF-50) to prove prior disciplinary actions in aggravation of later misconduct. In earlier cases, the board held that a lack of evidence of due process in the administration of the past discipline entitled the employee to litigate the validity of the underlying action before it could be used to aggravate later misconduct. The earlier cases did not address how the issue could be raised, however. *Matlock* now requires the agency to prove due process in prior actions, even if the appellant presents no evidence showing denial of due process.

#### *Mitigation of Penalty*

Considering the employee's 31 years of service and an otherwise good work and discipline record, the board reduced to a demotion the removal of a postmaster for making sexual advances to two subordinates. The proposing official testified that he had not reviewed appellant's past work or disciplinary record, nor had he compared the penalty with that imposed for similar offenses. The deciding official also testified that he had relied primarily on the seriousness of the charges. Although he said that he felt there was no hope for rehabilitation and that there were no mitigating circumstances, he provided no justification for his conclusions.

*Hooks v. United States Postal Serv.*, 41 M.S.P.R. 431 (1989).

#### *Successful OSC Prosecution*

The Office of Special Counsel obtained a three-year debarment of a retired employee who violated merit principles by offering to promote a woman if she would have sex with him. In *Special Counsel v. Doyle*, 1989 WL 149278 (Nov. 21, 1989), however, the board held that one count alleging harassment for an invitation to go to dinner and a hotel was insufficient to prove that the incident, taken in combination with a pattern of sexual propositions in the office, altered conditions of employment or created an abusive working environment.

#### *RIF—Bona Fide Reorganization*

Fort Sheridan abolished appellant's GS-10 position and created a similar GS-11 position. When it was filled with someone else, appellant accepted a GS-9 position. The administrative judge ruled that there had not been a bona fide reorganization, reasoning that the new position was essentially the same as the old, except that it involved supervision of fifteen more employees. The board reversed, holding that a change in the number of employees supervised may be adequate to show that a position has not continued after an alleged reorganization. It also found that the old and new positions differed in several respects. *Holmes v. Army*, 41 M.S.P.R. 612 (1989).

#### *Handicap as Defense*

Sustaining an employee's removal for physical inability to perform as a painter, the MSPB found that additional time for an employee to use special equipment would cause loss in production, thereby creating an undue hardship on the agency. Because of medical restrictions, the employee could not move heavy items. There was equipment available that would have enabled him to move heavy items, and the cost of the equipment—\$992—would not have imposed an undue hardship on the agency. But expert testimony that the equipment would have caused appellant to take from five to twenty times longer to accomplish various tasks led the board to find undue hardship on the Navy. *Miller v. Navy*, 42 M.S.P.R. 10 (1989).

#### *Settlement—Specificity of Language*

When appellant withdrew the appeal of his removal, the Air Force agreed to reemploy him as a temporary once the settlement agreement was finalized. His appointment was delayed over four months because of the agency's requirement that he take a medical examination as a condition of employment. The temporary appointment terminated five months later. Finding the settlement and termination without notice of the temporary appointment valid, the board nevertheless agreed with the administrative judge that the Air Force had breached the terms of the agreement by failing to reinstate appellant on the date of the settlement. Rejecting the argument that 5 C.F.R. § 339.301 requires an agency to direct a medical exam in certain circumstances, the board held that the agency could have provided in the agreement that the employee submit to an examination prior to appointment, but did not. The board ordered

the agency to pay back pay for the four-and-a-half month delay and to reimburse the employee for the unnecessary medical expenses incurred for the exams. *Grube v. Air Force*, 41 M.S.P.R. 494 (1989).

#### *Proving Attorneys' Fees After Settlement*

A settlement agreement that leaves open the issue of attorneys' fees may lead to the same type of litigation that the agreement was intended to avoid. Notwithstanding Chairman Levinson's dissent, in *Miller v. Dep't of the Army*, No. PH075287A0087 (Nov. 28, 1989), the board held that when an appeal is settled before presentation of evidence, a motion for a hearing should be granted when a truly informed finding on entitlement to fees cannot otherwise be made. Evidence taken at a hearing would prove whether the appellant was substantially innocent and whether the agency action was unfounded. We have urged OPM to seek reconsideration. Nevertheless, we agree with the board that the fees issue ought to be resolved in the settlement and should not be deferred.

#### *Adjustment of EAJA Fees for Inflation*

Awards for attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, are adjusted for inflation. When it became effective, EAJA limited hourly rates to \$75. In *Chou v. United States*, 1989 U.S. Cl. Ct. LEXIS 227, fees were adjusted by 37% based on inflation statistics for the Washington, D.C., area, rather than on the national average. Inflation was figured based on the date the employee was found to be entitled to the fee award, instead of when the attorney performed the legal work.

#### *Union Attorneys' Fees*

MSPB reaffirmed its position that union attorneys are entitled to fees based on a cost-plus-overhead formula, even if the entire fee award goes to the union's legal defense fund. The MSPB declined to follow the opinion in *Curran v. Dep't of the Treasury*, 805 F.2d 1406 (9th Cir. 1986), which had awarded market rate fees. *Kean v. Army*, 41 M.S.P.R. 618 (1989).

#### **Equal Employment Opportunity**

##### *Public Sector Affirmative Action*

Interpreting *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), which suggested that preferential hiring practices must be justified by past discrimination, *Conlin v. Blanchard*, 1989 WL 141326, 51 FEP Cases 707 (6th Cir. Nov. 27, 1989), concluded that "significant statistical differences [between current employees and the relevant labor pool]—both past and present—could be enough, when considered in the light of all other evidence, to satisfy the state's burden of proving past discrimination . . . ." In this challenge by males under 42 U.S.C. § 1983 and the fourteenth amendment to the State of Michigan affirmative action plan, the circuit remanded for analysis of the statistical basis and for a determination of whether the use of sex or race was narrowly tailored. With respect to the latter concern, the court suggests that sex or race may be used as a "tie-breaker" after literally all other factors have been considered and found to be equal." Underlying the

observation is the court's conclusion that when the candidates are otherwise equal, a losing candidate might not prevail, even if race or sex were not a factor.

#### *Handicap Discrimination/Sexual Harassment*

In *Brooke v. Frank*, 90 FEOR 3025, the EEOC affirmed the removal of a hearing impaired probationary employee for poor work habits, a bad attitude, and excessive talking. To prove disparate treatment, she showed that another hearing impaired employee was discharged but later reinstated. She also alleged her supervisor sexually harassed her by showing her postcards of barely clothed men and women, commenting about her attire, and touching her leg and shoulder. The EEOC found that she failed to show a causal connection between her impairment and her misconduct and did not show disparate treatment with another impaired employee. The agency showed a legitimate basis for the different treatment of the two employees and also showed that it had recently terminated a non-hearing impaired employee. Brooke failed to prove sexual harassment because she was not offended when a co-worker showed her similar postcards, the comments about her attire did not create a hostile environment, she flirted with male employees, and there was no evidence that the alleged touching was sexually provocative.

#### *Waiver of EEO Complaint Rights*

The validity of waiver of EEO rights remains in issue. Although *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), presumed in dicta that an employee could waive rights as part of a settlement, *EEOC v. Cosmair, Inc.*, 821 F.2d 1085 (5th Cir. 1987), held that waiver of the right to file an Age Discrimination in Employment Act (ADEA) charge with the EEOC violated public policy. Recognizing the public interest in private dispute resolution, the court found a superior interest in not impeding EEOC enforcement of civil rights. While *Cosmair* involved the private sector complaint process in which EEOC prosecutes complaints on behalf of employees, EEOC is merely an impartial adjudicator of complaints in the federal sector.

Courts recognizing waiver examine whether the waiver is knowing and voluntary. See, e.g., *Shaheen v. B.F. Goodrich, Co.*, 873 F.2d 105 (6th Cir. 1989); *Strohman v. West Coast Grocery Co.*, 884 F.2d 458 (9th Cir. 1989). Criteria they examine are the education and experience of the employee, the availability of counsel, the coerciveness involved, and the clarity of the agreement. In *Shaheen* the court stated that it would apply normal contract principles of fraud, duress, lack of consideration, and mutual mistake to its interpretation of a waiver.

The Army routinely obtains a waiver of EEO rights in voluntary settlements of EEO complaints. AR 690-600, figure 2-9, paragraph 5. Waivers may also be contained in settlements of MSPB appeals, grievances, and in last chance agreements. We encourage bargaining for waivers. You can avoid disputes over agreements by not bargaining for waiver of the right to file an EEO complaint over future acts of discrimination. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221 (3d Cir.

1989). This issue may be important in a last chance agreement.

A last chance agreement suspends a disciplinary action for a trial period. Commission of misconduct generally or particularly described in the agreement effects the

prior action. The agreement should waive the right to appeal or grieve the original action and any action taken during the trial period, but should waive EEO rights only with respect to events occurring before the agreement was signed. We welcome your views in this uncertain area.

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## Criminal Law Division Notes

*Criminal Law Division, OTJAG*

### Article 15 Filing

New procedures for filing Article 15's are effective 25 January 1990. Chapter 3, AR 27-10, permits the imposing commander to select the portion of the Official Military Personnel File (OMPF) where a formal Article 15 is permanently recorded. The new policy permits only one Article 15 (for sergeants and above) to be filed on the restricted fiche.

After 25 January 1990, records directed for permanent filing on the restricted fiche of the soldier's OMPF will be filed on the performance fiche if the soldier has a previous, non set-aside Article 15 recorded on the restricted fiche that reflects punishment while the soldier was a sergeant.

The new filing procedure preserves the restricted fiche filing option for first time offenders and prevents multiple misconduct from being shielded from promotion and selection boards. The restricted fiche filing option was never intended to be used for repeat or serious offenses.

The new filing procedures will also eliminate time in service criteria from filing options. Article 15's for soldiers in the grade of specialist and below (prior to punishment) will be filed locally for two years or until the soldier is transferred to the jurisdiction of another general court-martial convening authority. No copy will be filed in the soldier's OMPF. This could create the situation where a sergeant is reduced to specialist and then commits subsequent misconduct that results in punishment under Article 15. The record of this second punishment will be filed locally and will not be forwarded to the soldier's OMPF. For these soldiers, some other administrative measure such as a bar to reenlistment or an elimination action would seem appropriate and would result in permanent filing.

Congress intended Article 15 to be a disciplinary tool for commanders. It should be used for quick punishment to correct misbehavior, not as a means to create a permanent record. If the commander desires to maintain a permanent record of a lower ranking soldier's dereliction, a means other than Article 15 should be used.

Commanders who are concerned about a possible change in the filing option because the soldier has a previous Article 15 on the restricted fiche should ask the person in the best position to know the contents of the restricted fiche, the soldier concerned. If the soldier has

a previous Article 15 filed on the restricted fiche that reflects misconduct committed while the soldier was a sergeant, the restricted fiche filing option is not available to the imposing commander for the present misconduct.

Staff judge advocates should ensure that commanders are informed of this policy change.

### National Defense Authorization Act Message

*Reprinted below, in its entirety, is the text of a message concerning the National Defense Authorization Act for Fiscal Years 1990 and 1991.*

SUBJECT: AMENDMENTS TO UNIFORM CODE OF MILITARY JUSTICE

1. ON 29 NOV 89, PRESIDENT BUSH SIGNED THE NATIONAL DEFENSE AUTHORIZATION ACT FOR THE FISCAL YEARS 1990 AND 1991. THIS ACT MAKES SEVERAL CHANGES TO THE UCMJ. THE MOST SIGNIFICANT CHANGES ARE AS FOLLOWS:

A. THE SIZE OF THE COURT OF MILITARY APPEALS (CMA) IS INCREASED FROM 3 TO 5 JUDGES EFFECTIVE 1 OCT 90.

B. SENIOR CMA JUDGES AND ARTICLE III FEDERAL JUDGES ARE PERMITTED TO SERVE IN PLACE OF A DISABLED CMA JUDGE.

C. THE JUDGE ADVOCATES GENERAL ARE PERMITTED TO CERTIFY CASES TO A CMR EVEN WHEN THE SENTENCE IS NOT SUBJECT TO AUTOMATIC REVIEW.

D. THE PRESIDENT IS REQUIRED TO PRESCRIBE STANDARDS AND PROCEDURES TO INVESTIGATE MILITARY TRIAL AND APPELLATE JUDGES.

E. THE REMOVAL STATUTE APPLICABLE FOR CMA JUDGES IS MODERNIZED. CMA JUDGES MAY BE REMOVED FOR NEGLECT OF DUTY, MISCONDUCT, OR PHYSICAL OR MENTAL DISABILITY.

2. THE FOLLOWING CHANGES TO THE UCMJ ARE HIGHLIGHTED:

A. THE AUTHORIZATION ACT REVISES AND RESTATES THE CHARTER OF THE CMA AS

SUBCHAPTER XI OF THE UNIFORM CODE OF MILITARY JUSTICE. SUBCHAPTER XI IS NEW AND CONTAINS ARTICLES 141 THROUGH 146 OF THE U.C.M.J.

B. ARTICLE 141 RESTATES CURRENT LAW GOVERNING THE STATUS OF THE CMA. THE CMA IS ESTABLISHED UNDER ARTICLE I BUT LOCATED FOR ADMINISTRATIVE PURPOSES ONLY IN THE DEPARTMENT OF DEFENSE.

C. ARTICLE 141(A) INCREASES THE SIZE OF THE COURT FROM THREE TO FIVE JUDGES IN ORDER TO INCREASE STABILITY AND REDUCE THE ADVERSE IMPACT OF JUDICIAL TURNOVER. THIS ARTICLE DIRECTS THE COURT TO SIT AS A WHOLE FOR ALL ACTIONS RATHER THAN IN PANELS.

D. ARTICLE 141(B) REQUIRES THAT JUDGES BE APPOINTED FROM CIVIL LIFE AND THAT NO MORE THAN THREE JUDGES BE FROM THE SAME POLITICAL PARTY.

E. ARTICLE 142(C) MODERNIZES THE REMOVAL STATUTE TO INCLUDE REMOVAL OF A CMA JUDGE FOR NEGLIGENCE OF DUTY, MISCONDUCT, OR PHYSICAL OR MENTAL DISABILITY. UNDER THIS ARTICLE, A JUDGE MAY NOT BE REMOVED FOR ANY OTHER CAUSE.

F. ARTICLE 142(E) PERMITS SENIOR CMA JUDGES TO PERFORM DUTIES ON THE CMA WHEN A MEMBER OF THE CMA IS UNAVAILABLE TO SERVE ON THE CMA.

G. ARTICLE 142(F) PERMITS ARTICLE III FEDERAL JUDGES AND SENIOR CMA JUDGES TO SIT ON THE CMA WHEN A JUDGE OF THE CMA IS TEMPORARILY UNAVAILABLE.

H. ARTICLE 143(A) REQUIRES THE DESIGNATION OF A CHIEF JUDGE OF THE COURT.

I. ARTICLE 143(B) ESTABLISHES PROCEDURES TO DETERMINE PRECEDENCE OF THE CMA JUDGES.

J. ARTICLE 143(C) PROVIDES THE COURT WITH FLEXIBLE HIRING PROCEDURES WITH

REGARD TO CLERKS AND OTHER MEMBERS OF THE STAFF.

K. ARTICLE 144 RESTATES THE AUTHORIZATION FOR CMA TO ESTABLISH RULES OF PROCEDURE.

L. ARTICLE 145 OUTLINES CMA JUDGE RETIREMENT.

M. ARTICLE 146 RESTATES CURRENT LAW REGARDING THE CODE COMMITTEE. THE LANGUAGE FROM ARTICLE 67 ESTABLISHING THE CODE COMMITTEE AND OUTLINING THE DUTIES OF THE CODE COMMITTEE IS MOVED TO ARTICLE 146.

N. ARTICLE 67A OF THE U.C.M.J. IS NEW AND PROVIDES THAT CMA DECISIONS ARE SUBJECT TO REVIEW BY THE SUPREME COURT BY WRIT OF CERTIORARI. UNDER THIS ARTICLE, THE SUPREME COURT IS NOT ENTITLED TO REVIEW CMA DECISIONS THAT REFUSE TO GRANT A PETITION FOR REVIEW. ARTICLE 67A(B) PERMITS AN ACCUSED TO FILE A PETITION TO THE SUPREME COURT WITHOUT PREPAYMENT OF FEES AND COSTS.

O. AMENDMENTS TO ARTICLE 69, U.C.M.J. PERMIT JUDGE ADVOCATES GENERAL TO CERTIFY CASES TO THE COURTS OF MILITARY REVIEW WHEN THE SENTENCE IS NOT SUBJECT TO AUTOMATIC REVIEW. CONGRESS INTENDS THAT CASES INVOLVING THE INTERPRETATION OF THE MANUAL FOR COURTS-MARTIAL, THE U.C.M.J., THE CONSTITUTION - AS WELL AS OTHER IMPORTANT QUESTIONS OF LAW - BE REFERRED FOR THE DECISION OF THE COURTS OF MILITARY REVIEW.

P. ARTICLE 6A OF THE U.C.M.J. IS NEW AND REQUIRES THE PRESIDENT TO PRESCRIBE UNIFORM STANDARDS AND PROCEDURES FOR THE INVESTIGATION AND DISPOSITION OF CHARGES, ALLEGATIONS, OR INFORMATION PERTAINING TO THE FITNESS OF A MILITARY TRIAL OR MILITARY APPELLATE JUDGE TO PERFORM THE DUTIES OF THE JUDGE'S POSITION.

## Personnel, Plans, and Training Office Note

*Personnel, Plans, and Training Office, OTJAG*

### JAGC Selection Boards

The Judge Advocate General will convene a Conditional Voluntary Indefinite (CVI) Selection Board on 15 April 1990. The December 1989 issue of *The Army*

*Lawyer* incorrectly indicated that the board will also consider officers for Voluntary Indefinite (VI) status; in fact, the board will only consider officers for Conditional Voluntary Indefinite status.

## Enlisted Update

Sergeant Major Carlo Roquemore

### Court Reporting Equipment

I have received several questions from the field on how to replace worn out equipment and what equipment would be best to purchase. To provide you the best possible advice on these issues, I sought input from senior court reporters attending the Chief Legal NCO Management Course. They were asked to review the specifications for court reporting equipment. Their input was used to develop the minimum requirements for a court reporting system capable of both open microphone and closed microphone (stenomask) methods of recording trials. The need for these capabilities is based on field practice (at several installations) and current training of our court reporters. It was also observed that our current equipment is several years old and, in some places, must be replaced.

For installations and garrisons (table of distribution and allowances (TDA)) equipment is procured by use of installation (local) funds. I recommend you contact the major vendors of court reporting equipment and evalu-

ate their proposals. There are two units in a court reporting system: the recorder and the transcriber. To standardize as much as possible, look for a recorder that has two cassettes in one unit, four separate recording channels, and a mixer to allow use of more than one microphone per channel. It should also record at the standard 1 7/8 inches per second to be compatible with transcribers on your existing inventory. Transcribers are normally ordered with the recorder and are fairly standard pieces of equipment. They should have manual (hand) and foot pedal controls for playback. At a minimum, there should be one recorder per court room and one transcriber per court reporter on your installation TDA. Additionally, each courtroom should have five microphones: one each for prosecution, defense, court-martial panel, witness stand, and the judge's bench. For table of organization and equipment (TOE) units the procurement process is more involved but once completed, replacement of court reporting equipment will be done through issue based on the TOE and at no cost to the local organization. That process is ongoing.

## Note From the Field

### Army Corrections — What Will the Future Bring?

Sometime in the next few months, a decision will be made on the future direction of Army corrections. The decisionmakers will determine whether the Army should incarcerate soldier/prisoners, and if so, for how long. These decisions will affect the future of thousands of America's youth who, while serving in the military, end up requiring punishment and rehabilitation.

The fundamental issue is whether the Army, or for that matter any of the armed forces, should be in the business of running confinement and correctional facilities. The answer to this question is "yes."

Currently, the Army maintains numerous types of confinement and correctional facilities. These include installation confinement facilities (usually referred to as stockades); the United States Army Correctional Brigade (CB) at Fort Riley, Kansas (a medium security correctional facility); and the United States Disciplinary Barracks (DB) at Fort Leavenworth, Kansas (a maximum security correctional facility).

Congress has given the various Service Secretaries the authority to establish correctional facilities, and they have done so for innumerable years. There is well-established precedent that the Army should be involved in corrections. Additionally, it is logical that the Army, which is a recognized society within the larger American society, should have its own penal system that is structured to meet the unique requirements of military justice. The Army must maintain discipline within a

fighting force while according soldiers the fundamental protections found within our Constitution.

Accepting the fact that the Army should be in the corrections business, the issue then becomes one of degree. That is, how involved should we be in corrections? The answer is at 10 U.S.C. § 951(c), which states that the commander of a major military correctional facility "shall usefully employ those offenders as he considers best for their health and *reformation, with a view to their restoration to duty, enlistment for future service, or return to civilian life as useful citizens*" (emphasis added). It is apparent from the foregoing that the Army must try to rehabilitate the offender as long as he or she remains in the Army's correctional system. The Army cannot just warehouse incarcerated service members, it must provide rehabilitative services such as, but not limited to, vocational education training, psychological and social work services, and educational opportunities. The Army cannot be partially involved in corrections; we must make a commitment to be fully involved, or we should remain completely uninvolved.

Having established that the Army, if it assumes a correctional role, must do more than just warehouse prisoners, the next issue becomes one of duration. Should the Army act as warden for prisoners with only a certain amount of confinement or, as is present policy, confine prisoners for whatever the duration of the sentence? The answer, not found in law or regulation, must be a policy decision. I believe that the Army should not incarcerate long-term prisoners. These prisoners

would be transferred, within guidelines to be discussed, after execution of discharge to the jurisdiction of the Federal Bureau of Prisons. A long-term prisoner should be defined as anyone with a sentence approved by the convening authority of more than five years. It has been my experience over the eighteen years that I have been involved in the prosecution, defense, judging, or incarcerating of soldiers, that the sentence cutoff between the truly evil or criminal offender and the youthful or one-time violator is a sentence of more than five years' confinement. Of course, because the decision is based on the *approved* sentence, some offenders with an *adjudged* sentence of over five years will remain in the Army correctional system. This fact will have to be considered by convening authorities when entering into pretrial agreements or when otherwise adjusting adjudged sentences.

I am sure that some readers are thinking, "Why should the Army and not the Federal Bureau of Prisons incarcerate even short- to medium-term prisoners past the time of their discharge?" There are two reasons. First, the Army has a moral responsibility to place only the truly incorrigible or dangerous individuals (those individuals with a sentence of more than five years' confinement) into proximity with the hard core criminals found in the federal system. To do otherwise would subject those less than hardened criminals to all the soul deadening experiences found in the large federal institutions. The unfortunate end result would be to confirm a criminal life style in many otherwise one-time offenders. The second reason for remaining involved in short- to medium-term corrections is to maintain a confinement, rehabilitation, and restoration program that benefits the Army by: a) serving as a training and skill perfection base for correctional personnel whose skills are needed in wartime; b) providing a system for the restoration of deserving prisoners to duty; and c) providing needed services through prisoner vocational education training to correctional facility host installations. For example, Fort Riley, which is the host facility for the CB, receives a cost savings benefit from prisoner services of 4.3 million dollars a year.

Another pertinent question that the reader may raise is, "Why shouldn't the Army just continue with its

present policy of confining all prisoners?" The answer is that doing so does not even remotely aid the Army's mission, which is to field a force and fight. Prisoners with more than five years' confinement have evidenced so acute a criminal disposition that the possibility of retraining and restoring them to the active ranks is unthinkable. The same cannot be said of those with short- to medium-term sentences. A percentage of those are not absolutely lost to the Army and should, as necessary, be restored to duty.

If the Army remains in short- to medium-term corrections, where should these prisoners be incarcerated? Because there are two goals of incarceration, punishment and rehabilitation, the situs should not be a high, thick-walled penitentiary setting that only reinforces the image of being a "con." Short-term prisoners, with sentences of six to nine months or less, should be kept at the sentencing installation confinement facility. Their minimum release dates are so soon after sentencing that there would not be sufficient time to work with them at a gaining facility. Prisoners with sentences of between nine months and a day and five years of confinement should be incarcerated at a correctional facility providing adequate security to guard against escape, but which is purely military in appearance and organizational structure. In this environment the prisoner would be subject to organized, beneficial discipline; would receive rehabilitative services in familiar, non ego-killing surroundings; and would provide a benefit to the host installation. In short, just expand the population found at the U.S. Army Correctional Brigade located at Fort Riley, Kansas. The system found there is in place, experienced, and functioning.

As stated earlier, a decision about Army corrections will soon be made that will affect thousands of lives. Philosophically and morally it seems clear that the ultimate decision should be for the Army to remove itself from long-term corrections and concentrate on the short- to medium-term program which, as we have seen at the CB, will benefit both the Army and society as a whole. LTC Michael B. Kearns, Staff Judge Advocate, U.S. Army Correctional Brigade.

## CLE News

### 1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals di-

rectly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

### 2. TJAGSA CLE Course Schedule

1990

March 12-16: 14th Administrative Law for Military Installations Course (5F-F24).

March 19-23: 44th Law of War Workshop (5F-F42).  
 March 26-30: 1st Law for Legal NCO's Course (512-71D/E/20/30).  
 March 26-30: 26th Legal Assistance Course (5F-F23).  
 April 2-6: 5th Government Materiel Acquisition Course (5F-F17).  
 April 9-13: 102d Senior Officer Legal Orientation Course (5F-F1).  
 April 9-13: 7th Judge Advocate and Military Operations Seminar (5F-F47).  
 April 16-20: 8th Federal Litigation Course (5F-F29).  
 April 18-20: 1st Center for Law & Military Operations Symposium (5F-F48).  
 April 24-27: JA Reserve Component Workshop.  
 April 30-May 11: 121st Contract Attorneys Course (5F-F10).  
 May 14-18: 37th Federal Labor Relations Course (5F-F22).  
 May 21-25: 30th Fiscal Law Course (5F-F12).  
 May 21-June 8: 33d Military Judge Course (5F-F33).  
 June 4-8: 103d Senior Officer Legal Orientation Course (5F-F1).  
 June 11-15: 20th Staff Judge Advocate Course (5F-F52).  
 June 11-13: 6th SJA Spouses' Course.  
 June 18-29: JATT Team Training.  
 June 18-29: JAOAC (Phase IV).  
 June 20-22: General Counsel's Workshop.  
 June 26-29: U.S. Army Claims Service Training Seminar.  
 July 9-11: 1st Legal Administrator's Course (7A-550A1).  
 July 10-13: 21st Methods of Instruction Course (5F-F70).  
 July 12-13: 1st Senior/Master CWO Technical Certification Course (7A-550A2).  
 July 16-18: Professional Recruiting Training Seminar.  
 July 16-20: 2d STARC Law and Mobilization Workshop.  
 July 16-27: 122d Contract Attorneys Course (5F-F10).  
 July 23-September 26: 122d Basic Course (5-27-C20).  
 July 30-May 17, 1991: 39th Graduate Course (5-27-C22).  
 August 6-10: 45th Law of War Workshop (5F-F42).  
 August 13-17: 14th Criminal Law New Developments Course (5F-F35).  
 August 20-24: 1st Senior Legal NCO Management Course (512-71D/E/40/50).  
 September 10-14: 8th Contract Claims, Litigation & Remedies Course (5F-F13).  
 September 17-19: Chief Legal NCO Workshop.

### 3. Civilian Sponsored CLE Courses

#### May 1990

3-4: ALIABA, Business Disputes: Management and Resolution, Washington, DC.  
 3-4: PLI, Current Developments in Bankruptcy and Reorganization, St. Louis, MO.  
 3-4: ALIABA, Insider Trading and Fraud under Federal Securities Laws, Washington, DC.  
 3-4: SLF, Institute on Wills and Probate, Dallas, TX.

3-4: ALIABA, Securities Law for Nonsecurities Lawyers, Los Angeles, Ca.  
 3-5: ALIABA, Employment Discrimination and Civil Rights Actions, Charleston, SC.  
 3-5: ABA, Worker's Compensation, Dallas, TX.  
 6-10: NCDA, Trial Advocacy, Orlando, FL.  
 6-11: NITA, Advanced Trial Advocacy Program, Gainesville, FL.  
 6-11: NJC, Special Problems in Criminal Evidence, Reno, NV.  
 6-18: NJC, General Jurisdiction (Section II), Reno, NV.  
 7-9: GWU, Patents, Technical Data and Computer Software, Washington, DC.  
 8: PLI, Insurance Program, New York, NY.  
 9-12: NELI, Employment Law Litigation, San Diego, CA.  
 10: PLI, Environmental and Toxic Tort Claims: Insurance Coverage, New York, NY.  
 10-11: ALIABA, Antitrust Law, San Francisco, CA.  
 10-11: USCLC, Computer Law Institute, Los Angeles, CA.  
 10-11: ALIABA, New England Computer Law Conference, Boston, MA.  
 10-11: NKU, Trial Advocacy, Covington, KY.  
 10-11: ABA, Product Liability, Paris, France.  
 10-20: NITA, Southeast Regional Trial Advocacy Program, Chapel Hill, NC.  
 11: PLI, Insurer Disputes, New York, NY.  
 15-18: ESI, Competitive Proposals Contracting, Washington, DC.  
 17-18: PLI, Commercial Real Estate Leases, Atlanta, GA.  
 17-18: ABA, International Trusts and Estates, New York, NY.  
 17-18: PLI, Libel Litigation, New York, NY.  
 20-23: NCDA, Trial of the Juvenile Offender, San Antonio, TX.  
 20-25: NJC, Sentencing Misdemeanants, Reno, NV.  
 20-1 June: NJC, Special Court—Basic Jurisdiction, Reno, NV.  
 20-1 June: NJC, Special Court—Intermediate Jurisdiction, Reno, NV.  
 21-25: SLF, Labor Law and Labor Arbitration Short Course, Dallas, TX.  
 22-25: ESI, Contract Negotiation, Washington, DC.  
 23: PLI, Contract and Legislative Drafting, New York, NY.  
 23-25: NITA, Deposition Skills Program, Chicago, IL.  
 23-June 3: NITA, Pacific Regional Trial Advocacy Program, San Diego, CA.  
 24-June 3: NITA, Mid-America Regional Trial Advocacy Program, Lawrence, KS.  
 24-June 29, NJC, Administrative Law: Advanced, Reno, NV.  
 25: NKU, Products Liability, Covington, KY.  
 27-June 1: NJC, Special Court Advanced Evidence, Reno, NV.  
 30-June 1: PLI, Annual Antitrust Law Institute, New York, NY.  
 30-June 10: NITA, Western Regional Trial Advocacy Program, Berkeley, CA.  
 31-June 2: ALIABA, Partnerships: UPS, ULPA, Tax-

ation, Drafting, Securities, Seattle, WA.

31: Eighth Annual Judicial Conference, US Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed below.

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020. (212) 484-4006.

AAJE: American Academy of Judicial Education, 2025 Eye Street, NW., Suite 824, Washington, D.C. 20006. (202) 755-0083.

ABA: American Bar Association, 750 North Lake Shore Drive, Chicago, IL 60611. (312) 988-6200.

ABICLE: Alabama Bar Institute for Continuing Legal Education, Box CL, University, AL 35486. (205) 348-6230.

AICLE: Arkansas Institute for CLE, 400 West Markham, Little Rock, AR 72201. (501) 371-1071.

AKBA: Alaska Bar Association, P.O. Box 100279, Anchorage, AK 99510. (907) 272-7469.

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104. (800) CLE-NEWS; (215) 243-1600.

ASLM: American Society of Law and Medicine, Boston University School of Law, 765 Commonwealth Avenue, Boston, MA 02215. (617) 262-4990.

ATLA: Association of Trial Lawyers of America, 1050 31st St., NW., Washington, D.C. 20007-4499. (800) 424-2725; (202) 965-3500.

BLI: Business Laws, Inc., 11630 Chillicothe Road, Chesterfield, OH 44026-1928. (216) 729-7996.

BNA: The Bureau of National Affairs Inc., 1231 25th Street, NW., Washington, D.C. 20037. (800) 424-9890 (conferences); (202) 452-4420 (conferences); (800) 372-1033; (202) 258-9401.

CCEB: Continuing Education of the Bar, University of California Extension, 2300 Shattuck Avenue, Berkeley, CA 94704. (415) 642-0223; (213) 825-5301.

CICLE: Cumberland Institute for Continuing Legal Education, Samford University, Cumberland School of Law, 800 Lakeshore Drive, Birmingham, AL 35209. (205) 870-2865.

CLEC: Continuing Legal Education in Colorado, Inc., Huchingson Hall, 1895 Quebec Street, Denver, CO 80220. (303) 871-6323.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53715. (608) 262-3588.

DRI: The Defense Research Institute, Inc., 750 North Lake Shore Drive, Chicago, IL 60611. (312) 944-0575.

ESI: Educational Services Institute, 5201 Leesburg Pike, Suite 600, Falls Church, VA 22041-3203. (703) 379-2900.

FB: Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300. (904) 222-5286.

FBA: Federal Bar Association, 1815 H Street, NW., Washington, D.C. 20006. (202) 638-0252.

FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, NW., Washington, D.C. 20005. (202) 633-6032.

FP: Federal Publications, 1120-20th Street, NW.,

Washington, D.C. 20036. (202) 337-7000.

GICLE: The Institute of Continuing Legal Education in Georgia, P.O. Box 1885, Athens, GA 30603. (404) 542-2522.

GII: Government Institutes, Inc., 966 Hungerford Drive, Suite 24, Rockville, MD 20850. (301) 251-9250.

GULC: Georgetown University Law Center, CLE Division, 25 E Street, NW., 1th Fl., Washington, D.C. 20001. (202) 662-9510.

GWU: Government Contracts Program, The George Washington University, National Law Center, Room T412, 801 22nd Street, NW., Washington, D.C. 20052. (202) 994-6815.

HICLE: Hawaii Institute for CLE, UH Richardson School of Law, 2515 Dole Street, Room 203, Honolulu, HI 96822-2369. (808) 948-6551.

ICLEF: Indiana CLE Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204. (317) 637-9102.

IICLE: Illinois Institute for CLE, 2395 W. Jefferson Street, Springfield, IL 62702. (217) 787-2080.

ILT: The Institute for Law and Technology, 1926 Arch Street, Philadelphia, PA 19103.

KBA: Kansas Bar Association, 1200 Harrison Street, P.O. Box 1037, Topeka, KS 66601. (913) 234-5696.

LSBA: Louisiana State Bar Association, 210 O'Keefe Avenue, Suite 600, New Orleans, LA 70112. (800) 421-5722; (504) 566-1600.

LSU: Louisiana State University, Center of Continuing Professional Development, Paul M. Herbert Law Center, Baton Rouge, LA 70803-1008. (504) 388-5837

MBC: Missouri Bar Center, 326 Monroe St., P.O. Box 119, Jefferson City, MO 65102. (314) 635-4128.

MCLE: Massachusetts Continuing Legal Education, Inc., 20 West Street, Boston, MA 02111. (800) 632-8077; (617) 482-2205.

MIC: The Michie Company, P.O. Box 7587, Charlottesville, VA 22906-7587. (800) 446-3410.

MICLE: Institute of Continuing Legal Education, 1020 Greene Street, Ann Arbor, MI 48109-1444. (313) 764-0533; (800) 922-6516.

MLI: Medi-Legal Institute, 15301 Ventura Boulevard, Suite 300, Sherman Oaks, CA 91403. (800) 443-0100.

MNCLE: Minnesota CLE, 40 North Milton, Suite 101, St. Paul, MN 55104. (612) 227-8266.

MSBA: Maine State Bar Association, 124 State Street, P.O. Box 788, Augusta, ME 04332-0788. (207) 622-7523.

NCBF: North Carolina Bar Foundation, 1312 Annapolis Drive, P.O. Box 12806, Raleigh, NC 27612. (919) 828-0561.

NCCLE: National Center for Continuing Legal Education, Inc., 431 West Colfax Avenue, Suite 310, Denver, CO 80204.

NCDA: National College of District Attorneys, University of Houston Law Center, University Park, Houston, TX 77004. (713) 747-NCDA.

NCJFC: National College of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8970, Reno, NV 89507. (702) 784-4836.

NCLE: Nebraska CLE, Inc., 635 South 14th Street, P.O. Box 81809, Lincoln, NB 68501. (402) 475-7091.

NELI: National Employment Law Institute, 444 Magnolia Avenue, Suite 200, Larkspur, CA 94939. (415) 924-3844.

NITA: National Institute for Trial Advocacy, 1507

Energy Park Drive, St. Paul, MN 55108. (800) 225-6482; (612) 644-0323 in (MN and AK).

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89557. (702) 784-6747.

NJCLE: New Jersey Institute for CLE, One Constitution Square, New Brunswick, NJ 08901-1500. (201) 249-5100.

NKU: Northern Kentucky University, Chase College of Law, Office of Continuing Legal Education, Highland Hts., KY 41076. (606) 572-5380.

NLADA: National Legal Aid & Defender Association, 1625 K Street, NW., Eighth Floor, Washington, D.C. 20006. (202) 452-0620.

NMTLA: New Mexico Trial Lawyers' Association, P.O. Box 301, Albuquerque, NM 87103. (505) 243-6003.

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611. (312) 908-8932.

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207. (518) 463-3200; (800) 582-2452.

NYSTLI: New York State Trial Lawyers Institute, Inc., 132 Nassau Street, New York, NY 10038. (212) 349-5890.

NYUSCE: New York University, School of Continuing Education, 11 West 42nd Street, New York, NY 10036. (212) 580-5200.

NYUSL: New York University, School of Law, Office of CLE, 715 Broadway, New York, NY 10003. (212) 598-2756.

OLCI: Ohio Legal Center Institute, P.O. Box 8220, Columbus, OH 43201-0220. (614) 421-2550.

PBI: Pennsylvania Bar Institute, 104 South Street, P.O. Box 1027, Harrisburg, PA 17108-1027. (800) 932-4637; (717) 233-5774.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. (212) 765-5700.

PTLA: Pennsylvania Trial Lawyers Association, 230 S. Broad Street, 18th Floor, Philadelphia, PA 19102.

SBA: State Bar of Arizona, 363 North First Avenue, Phoenix, AZ 85003. (602) 252-4804.

SBMT: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59604 (406) 442-7660.

SBT: State Bar of Texas, Professional Development Program, Capitol Station, P.O. Box 12487, Austin, TX 78711. (512) 463-1437.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211-1039. (803) 771-0333.

SLF: Southwestern Legal Foundation, P.O. Box 830707, Richardson, TX 75080-0707. (214) 690-2377.

SMU: Southern Methodist University, School of Law, Office of Continuing Legal Education, 130 Storey Hall, Dallas, TX 75275. (214) 692-2644.

TBA: Tennessee Bar Association, 3622 West End Avenue, Nashville, TN 37205. (615) 383-7421.

TLEI: The Legal Education Institute, 1875 Connecticut Avenue, NW., Suite 1034, Washington, D.C. 20530

TLS: Tulane Law School, Tulane University, 7039 Freret St., New Orleans, LA 70118. (504) 865-5900.

UCCI: Uniform Commercial Code Institute, P.O. Box 812, Carlisle, PA 17013. (717) 249-6831.

UDCL: University of Denver College of Law, Institute

for Advanced Legal Studies, 7039 East 18th Avenue, Room 140, Denver, CO 80220. (303) 871-6125.

UHLCL: University of Houston Law Center, CLE, 4800 Calhoun, Houston, TX 77004. (713) 749-3170.

UKCL: University of Kentucky, College of Law, Office of CLE, Suite 260, Law Building, Lexington, KY 40506-0048. (606) 257-2922.

UMC: University of Missouri-Columbia, School of Law, Office of Continuing Legal Education, Law Building, Columbia, MO 65211. (314) 882-6487.

UMCC: University of Miami Conference Center, School of Continuing Studies, 400 SE. Second Avenue, Miami, FL 33131. (305) 372-0140.

UMKC: University of Missouri-Kansas City, Law Center, 5100 Rockhill Road, Kansas City, MO 64110. (816) 276-1648.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124. (305) 284-4762.

USB: Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111-3834. (801) 531-9077.

USCLC: University of Southern California Law Center, University Park, Los Angeles, CA 90089-0071. (213) 743-2582.

UTSL: University of Texas School of Law, 727 East 26th Street, Austin, TX 78705. (512) 471-3663.

VACLE: Committee of Continuing Legal Education of the Virginia Law Foundation, School of Law, University of Virginia, Charlottesville, VA 22901. (804) 924-3416.

VUSL: Villanova University, School of Law, Villanova, PA 19085. (215) 645-7083.

WSBA: Washington State Bar Association, Continuing Legal Education, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599. (206) 448-0433.

WTI: World Trade Institute, One World Trade Center, 55 West, New York, NY 10048. (212) 466-4044.

#### **4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates**

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama	31 January annually
Arkansas	30 June annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually
Montana	1 April annually
Nevada	15 January annually
New Jersey	12-month period commencing on first anniversary of bar exam

<u>Jurisdiction</u>	<u>Reporting Month</u>
New Mexico	For members admitted prior to 1 January 1990 the initial reporting year shall be the year ending September 30, 1990. Every such member shall receive credit for carry-over credit for 1988 and for approved programs attended in the period 1 January 1989 through 30 September 1990. For members admitted on or after 1 January 1990, the initial reporting year shall be the first full reporting year following the date of admission.
North Carolina	12 hours annually
North Dakota	1 February in three-year intervals
Ohio	24 hours every two years
Oklahoma	On or before 15 February annually

<u>Jurisdiction</u>	<u>Reporting Month</u>
Oregon	Beginning 1 January 1988 in three-year intervals
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Utah	31 December of 2d year of admission
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	31 December in even or odd years depending on admission
Wyoming	1 March annually

For address and detailed information, see the January 1990 issue of *The Army Lawyer*.

## Current Material of Interest

### 1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not

affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

#### Contract Law

*AD B136337	Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-89-1 (356 pgs).
*AD B136338	Contract Law, Government Contract Law Deskbook, Vol 2/JAGS-ADK-89-2 (294 pgs).
*AD B136200	Fiscal Law Deskbook/JAGS-ADK-89-3 (278 pgs).
AD B100211	Contract Law Seminar - Problems/JAGS-ADK-86-1 (65 pgs).

#### Legal Assistance

AD A174511	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-86-10 (253 pgs).
AD B135492	Legal Assistance Guide Consumer Law/JAGS-ADA-89-3 (609 pgs).
AD B116101	Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).
*AD B136218	Legal Assistance Guide Administration Guide/JAGS-ADA-89-1 (195 pgs).
AD B135453	Legal Assistance Guide Real Property/JAGS-ADA-89-2 (253 pgs).
AD A174549	All States Marriage & Divorce Guide/JAGS-ADA-84-3 (208 pgs).

AD B089092 All States Guide to State Notarial Laws/JAGS-ADA-85-2 (56 pgs).  
 AD B093771 All States Law Summary, Vol I/JAGS-ADA-87-5 (467 pgs).  
 AD B094235 All States Law Summary, Vol II/JAGS-ADA-87-6 (417 pgs).  
 AD B114054 All States Law Summary, Vol III/JAGS-ADA-87-7 (450 pgs).  
 AD B090988 Legal Assistance Deskbook, Vol I/JAGS-ADA-85-3 (760 pgs).  
 AD B090989 Legal Assistance Deskbook, Vol II/JAGS-ADA-85-4 (590 pgs).  
 AD B092128 USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).  
 AD B095857 Proactive Law Materials/JAGS-ADA-85-9 (226 pgs).  
 AD B116103 Legal Assistance Preventive Law Series/JAGS-ADA-87-10 (205 pgs).  
 AD B116099 Legal Assistance Tax Information Series/JAGS-ADA-87-9 (121 pgs).  
 AD B124120 Model Tax Assistance Program/JAGS-ADA-88-2 (65 pgs).  
 AD-B124194 1988 Legal Assistance Update/JAGS-ADA-88-1

#### Claims

AD B108054 ClaimsProgrammedText/JAGS-ADA-87-2 (119 pgs).

#### Administrative and Civil Law

AD B087842 Environmental Law/JAGS-ADA-84-5 (176 pgs).  
 AD B087849 AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-86-4 (40 pgs).  
 AD B087848 Military Aid to Law Enforcement/JAGS-ADA-81-7 (76 pgs).  
 AD B100235 Government Information Practices/JAGS-ADA-86-2 (345 pgs).  
 AD B100251 Law of Military Installations/JAGS-ADA-86-1 (298 pgs).  
 AD B108016 Defensive Federal Litigation/JAGS-ADA-87-1 (377 pgs).  
 AD B107990 Reports of Survey and Line of Duty Determination/JAGS-ADA-87-3 (110 pgs).  
 AD B100675 Practical Exercises in Administrative and Civil Law and Management/JAGS-ADA-86-9 (146 pgs).  
 AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

#### Labor Law

AD B087845 Law of Federal Employment/JAGS-ADA-84-11 (339 pgs).  
 AD B087846 Law of Federal Labor-Management Relations/JAGS-ADA-84-12 (321 pgs).

#### Developments, Doctrine & Literature

AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

#### Criminal Law

AD B135506 Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).  
 AD B100212 Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).  
 AD B135459 Senior Officers Legal Orientation/JAGS-ADC-89-2 (225 pgs).

#### Reserve Affairs

\*AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

\*Indicates new publication or revised edition.

#### 2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

<u>Number</u>	<u>Title</u>	<u>Date</u>
AR 37-104-10	Military Pay and Allowance Procedures for Reserve Components of the Army	17 Nov 89
AR 350-15	The Army Physical Fitness Program	3 Nov 89
AR 360-81	Command Information Program	20 Oct 89
AR 600-75	Exceptional Family Member Program, Interim Change 101	13 Dec 89
AR 608-18	The Army Family Advocacy Program, Interim Change 101	24 Nov 89
AR 750-2	Army Material Maintenance Wholesale Operations	27 Oct 89
UPDATE 12	Maintenance Management	31 Oct 89
	Military Pay and Allowances Entitlement Manual, Change 15	Oct 89